

1327 United States 1327  
**Circuit Court of Appeals**  
**For the Ninth Circuit.** /

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CLEM ROGERS,

Appellant,

vs.

BRIX BROS. LOGGING COMPANY, a Corpora-  
tion,

Appellee.

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**Transcript of Record.**

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Upon Appeal from the United States District Court for the  
District of Oregon.

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**FILED**  
OCT 5 - 1922  
**F. D. MONCKTON,**  
CLERK.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Yeon Building, Portland, Oregon,

For the Appellee.

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In the District Court of the United States for the  
District of Oregon.

IN EQUITY—No. —.

BRIX BROS. LOGGING CO, a Corporation,  
Plaintiffs,

vs.

CLEM ROGERS,

Defendant.

**Citation on Appeal.**

United States of America,—ss.

To the Above-named Complainant, Brix Bros. Logging Co., a Corporation, and Its Attorneys of Record, Messrs. Carey & Kerr and G. C. Fulton:

You are hereby notified that, in a certain case in equity in the District Court of the United States for the District of Oregon wherein said Brix Bros Logging Co. was complainant and Clem Rogers was defendant, an appeal has been allowed the

defendant therein to the United States Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said court at San Francisco, California, within thirty (30) days after the date of this citation, to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Hon. R. S. BEAN, United States District Judge for the District of Oregon, this 27th day of June, 1922.

R. S. BEAN,  
United States District Judge for the District of  
Oregon. [1\*]

Service of the within citation on appeal by certified copy at Portland, Oregon, this 27th day of June, 1922, is hereby admitted.

CAREY & KERR,  
Of Attorneys for Complainant, Brix Bros. Logging  
Co. [2]

[Endorsed]: No. E—8496. 25--87. In the District Court of the United States for the District of Oregon. In Equity. Brix Bros. Logging Co., Plaintiff, vs. Clem Rogers, Defendant. Citation on Appeal. Filed in the U. S. District Court, District of Oregon. Filed Jun. 27, 1922. G. H. Marsh, Clerk.

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\*Page-number appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for  
the District of Oregon.

November Term, 1919.

BE IT REMEMBERED that on the 8th day of  
December 1919, there was duly filed in the District  
Court of the United States for the District of Ore-  
gon, a transcript of record on removal from the  
Circuit Court of the State of Oregon for Clatsop  
County; that the complaint contained in said tran-  
script of record was in words and figures as follows,  
to wit: [3]

In the Circuit Court of the State of Oregon for  
Clatsop County.

BRIX BROS. LOGGING CO., a Corporation,  
Plaintiff,

vs.

CLEM ROGERS,  
Defendant.

### **Complaint.**

The above-named plaintiff complaining of the  
above-named defendant for its cause of suit al-  
leges:

#### **I.**

That plaintiff is now, and at and during all the  
times herein mentioned was, a private corpora-  
tion duly organized and existing under and by  
virtue of the laws of the State of Washington, and  
authorized to and engaged in the general logging

business and in the manufacture and sale of saw-logs in the County of Pacific, in the State of Washington.

## II.

That heretofore, and on the 28th day of November, 1917, the defendants herein, together with F. Dohrman, Jr., Chas. W. Corbaley, J. W. McDonald, Jr., F. K. Eckley, J. J. O'Toole, I. Fuendeling, M. Mannix, C. H. Caulfield, Emmet B. Gavin and A. P. Schmidt, duly organized under the laws of the State of Nevada a corporation by the name of Oregon Pacific Mill and Lumber Company, and the said Oregon Pacific Mill and Lumber Company is, and ever since said date has been, a corporation duly organized and existing under and pursuant to the laws of the State of Nevada. That upon the organization of said corporation, the following officers of such corporation were duly elected and qualified as such, that is to say:

F. Dohrman, Jr., Chas. W. Corbaley, J. W. McDonald, Jr., F. K. Eckley, J. J. O'Toole, I. Fuendeling and the defendant herein [4] were each elected directors of said organization, and each duly qualified as such on the 4th day of December, 1917, and thereafter continued to act as such, and ever since have been and still are directors of said corporation.

That at the first meeting of of the directors of said Oregon Pacific Mill and Lumber Company, the said F. Dohrman, Jr., was elected President of said corporation, Chas. W. Corbaley, Vice-President, J. W. McDonald, Jr., Secretary, and the said

defendant herein Clem Rogers was elected Treasurer, and each of said parties is now, and ever since has been, such officers and directors of said corporation, and each was such at and during all the times herein mentioned.

That after said corporation had been formed, the said corporation duly caused to be filed in the office of the Corporation Commissioner of the State of Oregon its declaration of its intention to transact business in Oregon, all in due form and in accordance with the laws of the State of Oregon, and also filed therewith in said office a copy of its Articles of Incorporation duly certified to by the Secretary of State of the State of Nevada, in due form and accordingly as required by the laws of the State of Oregon, and also at the same time filed in said office a power of attorney, duly executed and acknowledged, as required by law, appointing one Allan A. Hall attorney-in-fact for such corporation, who was and is thereby authorized and empowered to accept and receive service of all process, summons, suits and actions instituted against such corporation in Oregon and upon whom service of all process, summons, suits and actions against such corporation should be made.

That said documents above mentioned were filed in the office of the Corporation Commissioner on the 16th day of January, 1918, and thereupon there was issued to said Oregon Pacific Mill and Lumber Company a license to transact and engage in business [5] within the State of Oregon.

That according to the Articles of Incorporation of said Oregon Pacific Mill and Lumber Company, it was authorized and empowered to engage generally in the business of purchasing, acquiring and operating sawmills and sawmill plants for profit, and engaged generally in the lumber and other business.

### III.

That during the month of January, 1918, the said Oregon Pacific Mill and Lumber Company began the operation of a sawmill plant at the city of Astoria, in Clatsop County, in the State of Oregon, and operated and maintained said sawmill plant under lease or contract from the defendant herein, the exact nature of which is to the plaintiff unknown. That said sawmill plant was operated from the said — day of January, 1918, up to and until the — day of November 1918, when operations ceased.

That during the month of August, 1918, this plaintiff, at the instance and request of said Oregon Pacific Mill and Lumber Company, sold and delivered to such corporation a large amount of spruce logs, for which said corporation promised and agreed to pay plaintiff the sum of \$15,136.39, but paid no part thereof. That said spruce logs were used and employed by said Oregon Pacific Mill and Lumber Company at its said sawmill plant at Astoria, Oregon, and were sawed up into lumber and sold and disposed of, and the proceeds thereof collected by the said defendant herein and



not paid over to to the corporation Oregon Pacific Mill and Lumber Company.

That during the operation of said sawmill, the said Oregon Pacific Mill and Lumber Company had entered into a contract with the United States Spruce Production Corporation, as well as the United States Government, to manufacture at its mill spruce lumber for government use, and manufacture and deliver to said [6] United States Government and said United States Spruce Production Corporation considerable spruce lumber.

That the said Oregon Pacific Mill and Lumber Company closed its operations on or about said November 11, 1918, as aforesaid, and never transacted any further business but went out of business entirely. That when said Oregon Pacific Mill and Lumber Company closed its operations on said date aforesaid, its assets consisted of a considerable quantity of manufactured lumber on hand and a claim against the United States Government and the United States Spruce Production Corporation, in excess of \$190,000.00, the exact value of the assets of the said corporation being to plaintiff unknown. That immediately upon said corporation closing down its mill and ceasing to transact business, and on or about the 11th day of November, 1918, for the purpose of cheating and defrauding its creditors, particularly the plaintiff herein, the said Oregon Pacific Mill and Lumber Company, without any consideration to it paid or received and without any consideration whatever, assigned its said claim of \$190,000.00 against the

United States Spruce Production Corporation and the United States, together with its entire assets, including lumber and material on hand, to the defendant herein.

Thereupon, the defendant proceeded to and did present his claim against the United States Spruce Production Corporation and also the Contract Board, a board created by the United States for the purpose of settling controversies arising out of war conditions, including the claim of said Oregon Pacific Mill and Lumber Company for \$190,000.00, and there was paid to the said defendant herein and by him received from the United States Government on said claim aforesaid \$75,000.00 and more, which sum the said defendant received and has appropriated to his own use and without any consideration whatever, and the said defendant has also converted to his own use all of the assets of said corporation, [7] rendering the same entirely insolvent, and still holds the same in his possession and refuses to satisfy the debts of said corporation, and refuses to satisfy the claim of plaintiff herein.

That at the time said assignment was made to said defendant herein, and at the time said defendant herein received from said corporation all of its assets as aforesaid, such defendant was a director in said corporation and was the Treasurer thereof and used and employed the said assets of said corporation to further his own interests.

#### IV.

That heretofore, and on the 17th day of July, 1919, by consideration of the above-entitled Court



in an action therein instituted by the plaintiff herein against the said defendant Oregon Pacific Mill and Lumber Company, and pursuant to due and legal proceedings therein had, a judgment was entered in such action in favor of the plaintiff herein and against the said Oregon Pacific Mill and Lumber Company, in the sum of \$15,864.97, together with the costs and disbursements of such action therein taxed at \$22.50. That said judgment was duly entered in the docket of liens for said County, and no part of the same has been paid, excepting there was paid thereon August 29, 1919, the sum of \$1,133.46, leaving due, owing and unpaid thereon, the sum of \$14,754.01, together with interest thereon at the rate of 6% per annum from said August 29, 1919, until paid.

That heretofore, and on the 4th day of September, 1919, plaintiff caused an execution to be issued upon such judgment in due form of law, and placed the same in the hands of the Sheriff of said County for service and execution. That said Sheriff has heretofore, and on the — day of September, A. D. 1919, returned said execution to the Clerk of this Court, with his certificate endorsed thereon to the effect that after diligent search and inquiry [8] he had been unable to find any property belonging to the said Oregon Pacific Mill and Lumber Company, and returned said execution wholly unsatisfied.

#### V.

That plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, by reason of the premises, plaintiff demands judgment and decree—

First. That the said defendant herein be required to file his answer herein and set forth therein the amount of money he received and the amount of property by him received from said corporation Oregon Pacific Mill and Lumber Company, and also what other property belonging to said corporation Oregon Pacific Mill and Lumber Company has come to his possession, and make full disclosure thereof.

Second. That said assignments and transfers, and each thereof, of said properties, and the whole thereof, the said claims and accounts be adjudged and decreed to have been fraudulent as to the plaintiff herein, and for the purpose of cheating and defrauding the creditors of said corporation Oregon Pacific Mill and Lumber Company, and was and is void as to the plaintiff herein.

Third. That defendant be, by decree of this Court, directed to pay over to plaintiff herein a sum sufficient to satisfy the said judgment obtained by plaintiff against said Oregon Pacific Mill and Lumber Company in full, together with interest thereon, together with the costs and disbursements of this suit.

Fourth. That plaintiff have judgment against the said defendant herein for the sum of \$14,754.01, together with interest thereon at the rate of 6% per annum from the 29th day of August, 1919, until paid, together with the costs and disbursements of this suit.

Fifth. That plaintiff have such other and further decree [9] in the premises as to this Honorable Court may seem equitable and just.

G. C. & A. C. FULTON,

Attorneys for Plaintiff.

In the Circuit Court of the State of Oregon for Clatsop County. Filed November 12, 1919. J. C. Clinton, Clerk. [10]

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AND AFTERWARDS, to wit, on the 15th day of July, 1920, there was duly filed in said District Court of the United States for the District of Oregon, the first amended answer of defendant, in words and figures as follows, to wit: [11]

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. —.

BRIX BROS. LOGGING COMPANY, a Corporation,

Plaintiff,

vs.

CLEM ROGERS,

Defendant.

**First Amended Answer.**

Comes now the defendant and by leave of this Court first had and obtained files his first amended answer to the original complaint herein, and for

answer thereto admits, denies and alleges as follows:

### I.

This defendant denies that he, with the others named in said complaint, or otherwise or at all, on the 28th day of November, 1917, or at any time, duly or at all, organized a corporation by the name of Oregon Pacific Mill and Lumber Company, or that I. Feundeling is or ever was a director of the said company, or that this defendant was elected a director of said corporation upon its organization, or at any time prior to the third day of June, 1918, or that he qualified to act or acted as a director thereof prior to said third day of June, 1918.

Defendant denies that Chas. W. Corbaley is or since the 24th day of September, 1918, has been an officer or director of said Oregon Pacific Mill and Lumber Company, or that J. W. McDonald, Jr., is or since September 24, 1918, has been an officer or director of the said corporation.

Defendant further denies that the defendant was elected treasurer of the said corporation at the first meeting of its directors or of its board of directors, or at all, except that he admits that at a meeting of the board of directors of said company, held on the second day of January, 1918, he was elected treasurer of said company, and that he, during all the times herein mentioned, acted as the treasurer thereof. [12]

### II.

Defendant denies that said Oregon Pacific Mill and Lumber Company operated or maintained a

sawmill plant in Clatsop County, Oregon, at any time after September 1, 1918, but admits and alleges the fact to be that in January, 1918, said Oregon Pacific Mill and Lumber Company began the operation of a sawmill plant at or near the City of Astoria, Clatsop County, Oregon, and continued to operate and maintain said sawmill from some time in January, 1918, until August 30, 1918.

### III.

Defendant denies that any moneys or credits of the said company coming into his hands or possession were not paid over to said corporation or duly accounted for to it by him. Defendant furthermore denies that said company has gone out of business or ceased to transact business, although he admits that no sawmill operations have been conducted by it since about the first day of September, 1918.

### IV.

Defendant denies that said corporation on November 11, 1918, or at any other time, assigned or transferred to him all or any of its property or assets, except as hereinafter expressly admitted; and furthermore denies that any such transfers or assignments were without consideration, or that they were made for the purpose of cheating or defrauding any of the creditors of said company or the plaintiff herein; and the defendant alleges the fact to be that long prior to the month of August, 1918, said Oregon Pacific Mill and Lumber Company, for the purpose of securing certain advances made to it or for its account by this defendant, and to in-

demnify him against loss on account of credit extended to and for the account of said company, and on account of the obligations assumed by this defendant for [13] the benefit of said company, caused to be assigned and transferred unto this defendant said sawmill in Clatsop County, Oregon, together with the buildings, machinery, tools, implements and equipment used in connection therein, and also its said timber lands in said Clatsop County, Oregon; and that on or about the eighth day of October, 1918, in partial satisfaction of its then indebtedness to this defendant, secured as aforesaid, said Oregon Pacific Mill and Lumber Company did, for a valuable consideration, absolutely sell, assign, transfer and convey unto this defendant all of said timber lands and said sawmill with the buildings, machinery, tools, implements and equipment used in connection therein. This defendant has heretofore, and prior to the institution of this suit, with the consent of said company, taken possession and ever since has been and now is in possession of all of said property. The advances thus made by defendant to said company or for its account amounted to the sum of three hundred and forty-five thousand dollars (\$345,000.00), of which a considerable amount still remains due and payable and unpaid.

#### V.

Further answering the complaint herein, this defendant admits that said Oregon Pacific Mill and Lumber Company did assign to him its claim against the United States Spruce Production Cor-



poration and the United States of America, and that this defendant did present said claim to the United States Spruce Production Corporation and also to the Contract Board, a board created by the United States for the purpose of settling the controversies arising out of war contracts, but denies that he received the sum of \$75,000.00, or any sum whatsoever, in settlement or in partial settlement, or on account of any such claim, and alleges the fact to be that said claim was disallowed *in toto* on the ground and for the alleged reason on the part of the United States Spruce [14] Production Corporation and the United States that the contract between said Oregon Pacific Mill and Lumber Company and the United States of America and/or the United States Spruce Production Corporation had been cancelled and rescinded by and with the consent of the Oregon Pacific Mill and Lumber Company, and that there was nothing due upon said claim.

## VI.

Defendant denies that he has converted to his own use, or at all, any or all of the assets of said company, or that he now has in his possession, or that at the time of the institution of this suit he had in his possession, any monies received by or paid to him on account of any such claim and further denies that he has converted, misappropriated or otherwise misapplied all or any of the assets of said Oregon Pacific Mill and Lumber Company.

## VII.

This defendant, further answering the complaint

herein, suggests that the bill of complaint is defective in that it fails to join as a party defendant herein said Oregon Pacific Mill and Lumber Company, a Nevada corporation.

WHEREFORE, this defendant prays that this suit be dismissed and that the defendant have and recover his costs and disbursements herein of and from the plaintiff. [15]

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AND AFTERWARDS, to wit, on the 12th day of December, 1921, there was duly filed in said court, an opinion, in words and figures, as follows, to wit: [16]

### **Opinion.**

Portland, Oregon, December 12, 1921.

Memorandum by BEAN, District Judge, on Merits:

In November, 1917, the Oregon Pacific Mill and Lumber Company was organized as a corporation by residents of California under the laws of Nevada, to engage in the manufacture and sale of lumber in Oregon. It thereupon acquired a mill and other properties in Clatsop County in this state, and on December 22, 1917, entered into a contract with the Signal Corps, United States Army (hereinafter referred to as "the government"), to manufacture and deliver to it ten million feet of spruce lumber within the period of eighteen months at the rate of 560,000 feet per month. About that time the defendant agreed to finance the enterprise by advancing to the corpo-



ration at least \$300,000.00 for the purpose of enabling it to carry out its contract with the Government. To secure him for such advance, the corporation on January 8, 1918, conveyed to him all the property then owned by it, including the contract with the Government for the sale of spruce, and such as it might thereafter acquire, and appointed him manager and treasurer.

The defendant made advances from time to time as agreed upon, and on June 3, 1918, acquired 51% of the capital stock and was elected one of the Directors and Secretary and Treasurer.

The corporation thereafter continued business, the defendant making further advances from time to time, and during the month of August, 1918, the plaintiff sold and delivered to it spruce logs, for which it subsequently recovered [17] judgment against the corporation for \$15,864.97 and \$22.50 costs, no part of which has been paid except the sum of \$1133.46, leaving due and unpaid the sum of \$14,754.01, with interest at six per cent per annum from August 29, 1919.

By the first of October, 1918, the corporation had become indebted to the defendant in the sum of \$345,000 and was unable to continue its business. It thereupon transferred and conveyed to him its physical properties at an agreed value of \$306,000 which amount was to be credited by him on the indebtedness due him, and it authorized him to obtain a cancellation of its contract with the government for the manufacture of spruce lumber. On the 8th of October such contract was cancelled at

the defendant's request and in lieu thereof a new contract was entered into between him and the Government for the delivery to it by him of 6,200,000 feet within the period ending June 30, 1919, at the rate of 560,000 feet per month. This contract, although properly signed and approved seems never to have been delivered.

November 11, 1918, defendant was notified that the Government would accept no further deliveries of spruce lumber. He thereupon in his own right and as assignee of the corporation filed with the proper Government authorities a claim for reimbursement for damages suffered by reason of such refusal, and in due time his claim was allowed and he was paid the sum of \$60,000.

The question for decision is whether the defendant shall be allowed to retain and apply to his own use the amount received by him from the Government over and above that due him from the corporation, or whether it shall be applied on plaintiff's judgment. [18]

For the defendant the contention is that the payment made to him by the Government was for damages which he alone suffered by reason of the cancellation of the contract of October 8, 1918. But that contract was, in effect, a mere substitution for, or continuation of the former contract with the corporation because he had succeeded to the rights, obligations and property of the corporation, and was conducting the business formerly engaged in by it. It called for deliveries within the period prescribed in the original contract and in the same

quantities monthly. The aggregate amount to be delivered is probably (although there is no evidence on that point) the quantity remaining undelivered by the corporation.

The claim for damages as presented to the Government by the defendant, although made in his own right and as assignee of the corporation, supports this theory. It is based entirely upon the original contract with the Government, the financial transactions of the corporation and its dealings with the government and claims reimbursement on account thereof. The second contract is not mentioned or referred to therein.

The statement submitted in support of the claim is to the same effect, and the principal evidence offered is a report of certified accountants made up from the books and accounts of the corporation. It is upon this theory that the claim was considered and allowed by the Contract Board of the Spruce Production Corporation, which in its findings recites the history of the transactions from the making of the contract with the corporation in December, 1917, to the refusal of the Government to accept further deliveries, and based thereon recommended the allowance. [19]

I conclude, therefore, that plaintiff is entitled to the relief as prayed for and decree may be prepared accordingly. [20]

AND AFTERWARDS, to wit on Wednesday, the 28th day of December, 1921, the same being the 44th judicial day of the Regular November Term of said court—Present the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [21]

**Final Decree.**

This cause came on to be heard at this term and was argued by counsel, and thereupon upon consideration thereof, it was ORDERED, ADJUDGED and DECREED that the above-named plaintiff have and recover of and from the above-named defendant the sum of \$14,754.01, together with interest thereon at the rate of 6% per annum from the 29th day of August, 1919, until paid, together with the costs and disbursements of this suit to be taxed. That execution issue therefor.

R. S. BEAN,  
Judge. [22]

---

AND AFTERWARDS, to wit, on the 21st day of December, 1921, there was duly Filed in said court, a petition for rehearing, in words and figures as follows, to wit: [23]

**Petition for Rehearing.**

The defendant respectfully requests a rehearing, believing that your Honor has erred both in the

law and on the facts in your opinion of December 12th.

First as to the facts: Your Honor has, in effect, decided that all of the \$60,000 awarded by the Spruce Board should go to the Oregon-Pacific Mill and Lumber Company on account of cancellation of contract S. P. D.-4. True, your Honor has allowed Rogers to keep so much of this sum as the corporation admittedly owes him. But this is a mere matter of offset. The full \$60,000 is decreed to be damages for cancellation of S. P. D.-4, and to belong to the corporation; and none of it—not a penny—is decreed to be damages for cancellation of S. P. D.-261 and on that ground to belong to Rogers.

Even if contract S. P. D.-261 be considered, as your Honor chooses to consider it, merely a continuation of contract S. P. D.-4 so that the two contracts cover, in effect, one transaction, how can your Honor say that *all* of the \$60,000 awarded for cancellation should be considered as compensation for the cancellation of the first contract only?

The first contract had proven a losing contract, the officials of the Spruce Division were disgusted with the way Corbaley and MacDonald had conducted things, and the first contract had been cancelled at the request of the *Oregon Pacific Mill and Lumber Company* because *Mr. Dorman, the president, was afraid he or his company might be held liable for damages* to the Government because of their utter failure. [24]



The second contract was, compared to the first, a profitable one, and under the management of Brown, who was installed by Rodgers when he took possession, order was brought out of chaos, things were going ahead more promisingly, and the Spruce Division officers were satisfied.

I call your attention to the statement in the findings of the Settlement Board, paragraph 5. "The board does not recognize the entire claim of Mr. Rogers because of the fact that his mill was operating at a loss while under the direction of Mr. Corbaley and the board cannot consistently recommend consideration of repayment of losses sustained by reason of one individual permitting his affairs to be managed by another individual when the second individual through his own negligence occasions such losses. 'On the other hand, the board recognizes the fact that there *is still an open contract* for the delivery of 4,400,000 feet of airplane spruce lumber *without a cancellation clause attached, and upon which claimant can rest his claim*, especially in view of the fact that during the last couple of months operation of this mill under the new manager, it is evident that *the mill was producing lumber at a profit.*'"

I call your attention to the combined profit and loss account shown on page 3 of the report of Robinson & Bours, certified public accountants, Plaintiff's Exhibit 4, where it appears that the net profit under the first contract from November 28, 1917 to September 30, 1918, *ten months*, was only \$19,691.02, and under the second contract the

net profits were \$8,053.50 from October 1, 1918 to November 30, 1918, *two months*, but in reality only *one month and twelve days*, since operations were shut down November 12th. In the face of this, how can your Honor say that all of the \$60,000 should go to the first contract? [25] On the ratio profits, nearly all of the \$60,000 would go to Rogers. Your Honor will be the first to acknowledge that Courts cannot jump at conclusions but must base their decrees on evidence, and I remonstrate with your Honor that there is absolutely no evidence in the case which would justify your giving all of this money to the Oregon Pacific Mill and Lumber Company and ignoring the rights of the second contract altogether. Thus far I think your Honor on reconsideration will have to agree with me. Of course, I go much further and assert that the whole \$60,000 was awarded on the second contract and belongs to Rogers alone, leaving the Oregon Pacific still owing him between \$30,000 and \$40,000. But if your Honor cannot go that far with me as yet, let me ask this: If you concede that at least some portion of the \$60,000 was due on the second contract, was it not up to the plaintiff in this case to produce evidence by which your Honor could make a fair segregation of the \$60,000 between the two contracts? And has the plaintiff done so? And having failed to do so, can your Honor make any segregation, or must your Honor leave the plaintiff where he stands because he has failed to submit proof?

Your Honor says, in your opinion, after stating your theory that the second contract was merely a continuation of the first, that "the claim for damages as presented to the Government by the defendant, although made in his own right and as assignee of the corporation, supports this theory. *It is based entirely upon the original contract with the Government*, the financial transactions of the corporation and its dealings with the Government and claims reimbursement on account thereof. *The second contract is not mentioned or referred to therein.*"

In this your Honor is mistaken. The claim which [26] you say does not even refer to the second contract commences with this paragraph: "Presented herewith is the claim of Clem W. Rogers in his own right and as assignee of the Oregon-Pacific Mill and Lumber Company for reimbursement for damages suffered by reason of the breach and cancellation by the United States of *its* (the United States) *contract with claimants.*" The words in parentheses are mine, but they are a short way of making the meaning clear. Your Honor may have thought the word "its" referred to the Oregon-Pacific Mill and Lumber Company, but of course that is impossible, as that Company had no "contract with the claimant" which was being cancelled,

At the bottom of page 1 of the claim is the sentence "At this time the Government seeks to *cancel the contract.*" Which, of course, means S. P. D.-261, inasmuch as S. P. D.-4 had already been cancelled. I freely admit that the claim is



based upon both contracts. But I remind your Honor that the claim under both contracts was \$193,891.00, whereas only \$60,000.00 was allowed; which is very consistent with the theory that none was allowed for the first contract because government officials properly took the view that it had been cancelled at the request of the other party, and allowed the full \$60,000 on the second contract alone. If Rogers was not basing his claim at all on the second contract, why would he expressly mention that he was "claiming in his own right"?

In your Honor's opinion, page 3, you say, "But that contract (S. P. D.-261) was, in effect, a mere substitution for, or continuation of the former contract with the corporation because he (Rogers) had succeeded to the rights, obligations and property of the corporation, and was conducting the business formerly engaged in by it." I respectfully point out [27] to your Honor that if Rogers was merely going to continue the business of the corporation, and complete its contract so that the thing could be viewed, as your Honor views it, as all one transaction, an entirely different procedure would have been adopted. The corporation would have *assigned its contract to Rogers*, with the consent of the Spruce Corporation. But it was not a mere continuation and so this was not done. The Spruce officers were sick of the way Corbaley had been going on, Rogers was sick of it, Dorman was afraid of a suit by the government against him or his company, and so all parties decided to cut the thing off short and start afresh, and

that was done. And the government was perfectly right in refusing any award for cancellation of S. P. D.-4—a contract cancelled at the request of the party that later came forward and asked damages for the cancellation.

Consider for a moment the preponderance of the evidence. Mr. Rogers and Mr. Brown both testified that the Spruce Settlement Board absolutely declined to listen to any claim based on the first contract because it had been voluntarily cancelled. This evidence is uncontradicted. It was uncontradicted that they were advised by their counsel that nothing could be recovered on the first contract. In this state of affairs is it conceivable that Rogers would have accepted the \$60,000 with any notion that any *part of it*, let alone *all of it*, should go to the Oregon-Pacific Mill and Lumber Company on the first contract and he should get *nothing*? Let us illustrate a little. Would anyone—any speculator let us say—have come forward and paid \$60,000 for the rights of the Oregon-Pacific Company under contract S. P. D.-4 voluntarily cancelled at its own request? Not if he had been properly advised by counsel. Would anyone, offered his choice as to [28] which contract he would buy for \$60,000 have chosen S. P. D.-4? Again, does it mean nothing that the Oregon-Pacific has never asserted any claim to this money? Dorman, the President, is a man of wealth, well able to enforce his rights. The Oregon-Pacific owes him something over \$8,000. He is a creditor like Brix Brothers. He has never claimed any

part of this money or had the company claim it. Does that imply nothing?

I ask your Honor again to consider the recitals contained in the release prepared by the Spruce Production Corporation which was handed Rogers to sign. The first recital is that whereas Rogers has a contract, "No. S. P. D.-261, superseding contract No. S. P. D.-4 and dated October 8, 1918"; and secondly, whereas, the Government has cancelled "said contract," and thirdly, "whereas, the contractor claims certain damages by reason of *such cancellation*," and fourthly, "whereas, said contract board has allowed said claim in the sum of \$60,000, and the contractor has agreed to accept said award in full settlement and satisfaction of all claims or rights against either the government or said United States Spruce Production corporation arising out of *said contract*." This is the formal instrument of release executed three weeks after the findings of the board and those findings are merged in it. If there is anything in those findings inconsistent with the release, the release is paramount. It is as paramount as the verdict of a jury would be over informal notes and memoranda made in the jury-room showing how the jury reached their verdict. The findings are in no way binding on Rogers. He didn't make them or sign them. His acceptance attached to them is merely that he agrees to accept \$60,000 in full settlement of all claims.

Now the release shows as clearly as possible what contract the \$60,000 is being allowed on, and

absolutely [29] confirms Rogers' and Brown's uncontradicted testimony that the spruce officers refused to allow anything on the first contract. The statement in the release that Rogers releases the Government from all claims and demands growing out of the above mentioned contracts No. S. P. D.-261 and No. S. P. D.-4, or otherwise, etc., is merely the precautionary language of a lawyer who, when securing a release, makes it cover every possible claim he can think of. Since Rogers' claim had included S. P. D.-4, it was quite proper to force him to release as to S. P. D.-4, although nothing had been allowed on it.

I have compared the findings to notes and memoranda made in a jury room because your Honor takes the view that those findings are strong evidence to support your decree. The findings are somewhat ambiguous, and evidently hastily prepared, but there is just as much in them to support the defendant as the plaintiff,—particularly, in paragraph No. 5, the statements that the board does not recognize the entire claim because of the mismanagement of Corbaley under the first contract, but “recognizes the fact there is still an open contract (S. P. D.-261) for the delivery of 4,400,000 feet of airplane spruce lumber *without a cancellation clause attached and upon which claimant can rest his claim.*” This shows that the board regarded the first contract, since it was cancelled, as out of the way, but that the second contract “*without a cancellation clause attached*” deserved consideration.

Coming to the figures in the findings of the Contract Board, they are ambiguous, but there is one item that is very clear and that is that the award was raised from \$48,720 to \$60,000 on the theory that the Government under the contract of August 22, 1918, mentioned in the findings had gone into the claimant's timber and gutted it by selective logging process [30] and left it in a condition where there was no longer there a good logging "show," and that, consequently, the salvage value of \$100,000 mentioned in the computation was too high. Out of consideration for this they increased the award \$11,280. At the least minimum this \$11,280 must belong to Rogers, even under your Honor's theory, because Rogers in his settlement with the Oregon-Pacific Mill and Lumber Company took over the timber at the full purchase price which they had paid for it, less some deductions for taxes. Consequently, if he has reimbursed the Oregon-Pacific Mill and Lumber Company the full original purchase price of the timber, any money paid by the Government for damage to that timber should clearly go to him. Of course, what I have just said must not militate against my contention that the whole \$60,000 clearly belongs to him.

Your Honor evidently pays considerable weight to these findings. Since this case was decided I have talked to Mr. Cameron Squires, who was a member of and recorder of the Contract Board, and he wrote these very findings and signed them. Besides his signature, you will note his initials, "C. S." as the dictator of them. I asked the oppor-



tunity now of producing him as a witness and offer to show by him that the Contract Board was advised by its attorneys that no claims were valid under the first contract because it had been cancelled voluntarily at the request of the other party, and that the Contract Board in awarding the \$60,000 based such award entirely on the second contract, and intended the full sum to go to Rogers in his own right. As a reason for not offering Mr. Squires at the trial, I state that I interviewed him before the trial and he said that so many of these claims had passed before him that his mind was not clear on them after this lapse of time. It [31] was not until after your Honor's decision, when I showed him the findings, contracts and other papers, which findings I had never seen before they were produced at the trial, that Mr. Squires' recollection was sufficiently refreshed to enable him to testify.

But whatever the findings show,—however the \$60,000 was computed, is no concern of Rogers. The *release* is the thing. That was the subsequent document, in which the findings were merged, and it must control.

What is it the Spruce Board wanted from Rogers? A release. A release is what they bought for \$60,000. And if you want to know what the \$60,000 was paid for, and to whom it was rightfully destined, look at the release itself.—“Whereas C. W. Rogers, sole trader doing business under the name of Clatsop County Lumber Company,” etc.,—not assignee of the Oregon-Pacific Mill and Lumber

Company at all—nowhere mentioned as assignee—but only as sole trader. Whereas he has contract S. P. D.-261 *superseding* contract S. P. D-4. S. P. D-4 is out of the way—dead. Whereas he claims damages for cancellation of *said contract*—the only one that is uncanceled—S. P. D.-261. Whereas the board has allowed him \$60,000 in full settlement and satisfaction of *said contract*.

*That* is the release that Rogers sold; *that* is what he parted with for \$60,000. And it was drawn by the Spruce Division itself and approved by their legal department, as you can see from the paper itself. What concern was it of his? Or what concern should it now be of this Court's as to *how* the Contract Settlement Board computed the amount? Or what reasons influenced them? And what right has this Court now to declare to Rogers that he was selling a different release than he actually [32] did? A different release from the one in evidence? How can this Court declare that he signed a release of *his* claims as *sole trader* under his contract but under which release he was to get not a penny?

So much for the facts of the case. Now, for a discussion of the law.

This suit has several aspects. If it be considered a suit on the part of a creditor to recover funds misappropriated by an officer or director of the corporation, then the complaint is defective in two particulars.

In the **first** place, it is the defendant's contention that the Oregon-Pacific Mill and Lumber Com-

pany is and was an indispensable party to the suit and for these reasons:—if any money was misappropriated by Mr. Rogers, that misappropriation was primarily a breach of his duty as an officer and director of the corporation and made him liable to it therefor. In justice to the defendant, when he had raised the objection in his answer, as was done here, the corporation should have been joined as a party defendant, in order that it too might be precluded by the suit instituted by the creditor and the defendant not subjected to the possibility of further litigation upon the same claim. If, moreover, funds of the company were thus misappropriated, then the company very properly might be interested in seeing that the funds, if any, so misappropriated be distributed ratably among all its creditors.

In the case of *Cunningham vs. Pell*, 5 Paige, 607. the plaintiff, a judgment creditor of the corporation, brought suit against its directors alone to recover from them the [33] amount due upon his judgment, on the ground that they had misappropriated funds of the company.

Chancellor Walworth held that the demurrer to the complaint should be sustained, saying at page 613:

“But it is a fatal objection to all the relief claimed by this bill, that the corporation is not made a party. This question was decided in the case of *Robinson vs. Smith*, before referred to. Although that suit was brought by the stockholders, and this by a creditor of



the corporation, the principle is the same in both cases. If this creditor could compel the defendants to account to him for the funds of the bank which have been abstracted by the Pells, the corporation, if in existence, might hereafter compel the defendants to account a second time to it. Although the corporation is located in another state, if it does not appear voluntarily it may be proceeded against as an absent defendant."

In the case of *Chester vs. Halliard*, 36 N. J. E. 313, a suit was brought by various depositors of a savings bank against certain of its managers on behalf of themselves and such other depositors as might choose to join with them in the litigation seeking to recover the amount of their several deposits from the managers of the institution on two grounds, namely, fraud in misrepresentation as to the condition of the bank, which is not here pertinent, and secondly because the funds of the bank had been squandered by the defendants.

A demurrer to the bill having been interposed, the Court of Errors and Appeals, affirming the trial court's decision sustaining the demurrer on this ground, said at page 315:

"The second ground of complaint stated in the bill is deficient not in form, but in substance. It consists in statements showing that the defendants, as directors of the funds [34] of the bank so mismanaged its affairs that it became insolvent. The bank itself is not a party to the suit, and the consequence is the

complainants have no standing in court on this part of their case. If the capital and assets of the corporation have been squandered and lost by the misconduct of its officers, it is the corporate body itself that primarily has been wronged, and reparation is due immediately to it and not to the dispositors. The depositors are but creditors of the corporation, and the moneys in question are not their moneys. It is true that as the directors are alleged to be the delinquent parties who are sought to be charged with the liability to make good the losses in question, these depositors have a footing in court to such redress in this matter, but in such proceedings the corporation, or in case of its insolvency, its receiver, must be a party, for it is in right of such corporate body that such a course of law is alone to be vindicated. But I shall not further discuss this subject, for the decisions are uniformly opposed to the legal power of a member of the corporate body to bring a suit in his own right and in disconnection with the company, for losses occasioned to the corporation by the misconduct of its officers, and the topic has so recently undergone examination by the Supreme Court in the case of *Conley vs. Halsey*, 15 Vr. 111, decided at the last term of that court. This suit cannot be sustained against these defendants on this second ground, the same being thus essentially defective."

In Cook on Corporations (4th Edition), Section 738, in speaking of similar suits brought by stockholders, it is said:

“The corporation itself is an indispensable party defendant [35] to a stockholder’s action for the purpose of remedying a wrong which the corporation itself should have remedied. This rule is due to the fact that a similar possible suit by the corporation is thereby prevented, the rights of the corporation are duly ascertained, and the remedy made effectual against the corporation as well as others.”

See also:

Porter vs. Sabin, 149 U. S. 473; 13 Sup. Ct. Rep. 1008, 1110.

Lathrop, Shea & Henwood Company vs. Byrne, 100 N. Y. S. 104.

Robinson vs. Smith, 3 Paige, 222, 233.

Davenport vs. Dows, 18 Wallace, 626, 627.

Boyd vs. Mutual Fire Association (Wisconsin, 1903), 94 N. W. 171, 172.

In the second place the complaint is defective in that it fails to allege, and the evidence is insufficient in that it fails to show, any demand made by the plaintiff before the institution of this suit that it sue to recover the sums converted, or to show any excuse for not so doing. The wrong is primarily to the corporation and any action brought by either a stockholder of a solvent corporation or by a creditor of an insolvent corporation is in the right of the corporation, whereas in this state the

officers and directors of the corporation are not trustees for creditors and the trust fund theory so called is not adopted.

“Neither the corporation nor its governing body, so long as it is a going concern, holds its property in trust for creditors. The officers or directors occupy [36] a fiduciary relation, demanding care, vigilance, and good faith. If they violate their duty, they at once become responsible to the corporation. If they are guilty of misfeasance or malfeasance, the latter may at once bring an action at law to enforce such liability. If the corporation refuses to act, the stockholders before insolvency, and the creditors after insolvency, may enforce such liability in the right of the corporation, and not otherwise. Such right is not based entirely upon the relation of trusteeship sustained to the creditors, but rather upon the legal right of the corporation to compel them to make reparation for their wrong. The right of the creditor to enforce the rights of the corporation may be said to rest upon the so-called fiduciary relation which the officers sustain to the corporation and indirectly to them.”

Boyd vs. Mutual Fire Association (Wisconsin, 1903) 94 N. W. 171, 172.

“Generally, where there has been a waste or misapplication of the corporate funds, by the officers or agents of the company, a suit to compel them to account for such waste or misapplication should be in the name of the

corporation. But as this Court never permits a wrong to go unredressed merely for the sake of form, if it appears that the directors of the corporation refused to prosecute by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation was still under the control of those who must be made the defendants in the suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation a party defendant."

Robinson vs. Smith, 3 Paige, 222, 233.

Porter vs. Sabin, 149 U. S. 473; 13 Sup. Ct. Rep. 1008, 1110. [37]

Suits brought by creditors directly against officers of a corporation to recover funds of the corporation alleged to have been misappropriated by the defendant officer are rare. They are, however, analogous to such suits by stockholders.

"Creditors cannot themselves ordinarily maintain actions at law against the directors or other officers of a corporation to recover damages for conversion of its assets or loss by reason of misapplication thereof, or of negligence, since the injury is to the corporation. Generally, it is held that the proper mode of enforcing the liability, if the creditor has the right to sue, is by suit in equity on behalf of the creditors and to which the corporation itself is a party."

Fletcher on Corporations, Section 2673.



“Actions by creditors against corporate officers for wrongs primarily to the corporation itself are not common, except where the right to sue is created by statutes and the common law liability of officers to the corporation or its stockholders cannot generally be enforced by creditors, nor can the creditors sue as an individual under ordinary circumstances. Oftentimes, however, a statute creates a liability in favor of the creditors.”

Fletcher on Corporations, Section 2678.

If this suit be considered not one to recover from the defendant funds which he as an officer of the corporation has misappropriated, but rather a suit to set aside a fraudulent conveyance, that is to set aside the assignment of the claim of the corporation against the United States Spruce Production Corporation, the making of which is both [38] alleged by the complaint and admitted by the answer, then the Oregon Pacific Mill and Lumber Company is still an indispensable party and it was incumbent upon the plaintiff to join the corporation as a party defendant when the defect in parties was specifically raised in the answer and also by objection at the outset of the trial.

In *Gaylords vs. Kelshaw*, 1 Wallace, 81, the plaintiffs as judgment creditors of the defendant Kelshaw brought a suit in the Federal Circuit Court to set aside an alleged fraudulent conveyance of land from Kelshaw to Butterworth.

The plaintiffs were alleged to be citizens of Ohio, while defendant Butterworth was alleged to be a



citizen of Indiana. The complaint was silent as to the citizenship of the defendant Kelshaw.

In the absence of a showing on the face of the bill or in the record of the citizenship of the defendant Kelshaw, the question of the Federal Court's jurisdiction was discussed by the Supreme Court. The Court said:

“It is clear, that neither the Court below, nor this Court, has jurisdiction of the case as between plaintiffs and Kelshaw.”

But as the Court might, under some circumstances, proceed to adjudicate on the rights of the parties properly before it, we must look into the case, so far as to see if it is one in which relief may be decreed, as between plaintiffs and Butterworth, without regard to Kelshaw.

“Without referring to the numerous cases in this court and others, on the necessity of having all the proper parties before the Court, in a suit in equity, and the circumstances under which the court will proceed in some cases, without [39] persons who might well be made parties, it is sufficient to say that, in the present case, we think Kelshaw is properly made a defendant to this suit. It is a debt which he owes which is sought to be collected. It is his insolvency which is to be established, and it is his fraudulent conduct that requires investigation.

“If the conveyance to Butterworth shall be decreed to be set aside, and the property conveyed to him, subjected to the payment of

plaintiffs' debt, it is proper that Kelshaw should be bound by the decree; and to that end he ought to be a party."

In *Swan Land & Cattle Co. vs. Frank*, 148 U. S. 603, 13 Sup. Ct. Rep. 691, 694, in speaking of the case of *Gaylords vs. Kelshaw*, *supra*, it was said that in that case

"It was held by this Court that in a bill to set aside a conveyance as made without consideration and in fraud of creditors, the alleged fraudulent grantor is a necessary defendant, because it was his debts that were sought to be collected, and his fraudulent conduct that required investigation."

See also:

*Bank of Commerce vs. McArthur*, 248 Fed. 138, 141.

*Beswick vs. Dorris*, 174 Fed. 502, 508.

Your Honor's decision compels the writer to feel that he must have been at fault in his presentation of the case, and, in view of the matters now called to your Honor's attention in this petition, we respectfully ask a rehearing. [40]

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AND AFTERWARDS, to wit, on Monday, the 16th day of January, 1922, the same being the 60th judicial day of the regular November Term of said Court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [41]

**Order Denying Petition for Rehearing.**

This cause was submitted to the Court upon a petition of the defendant for a rehearing herein, upon consideration whereof,

IT IS ORDERED that said petition be and the same is hereby denied. [42]

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AND AFTERWARDS, to wit, on the 27th day of June, 1922, there was duly filed in said court a petition for appeal in words and figures as follows, to wit: [43]

**Petition for Appeal and Order Allowing Same.**

To the Honorable CHARLES E. WOLVERTON and the Honorable R. S. BEAN, Judge of the Above-entitled Court:

The above-named defendant, feeling himself aggrieved by the decree made and entered in this cause in the above-entitled court on the 28th day of December, A. D. 1921, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law and that the transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

Your petitioner further prays that the proper order touching the security required of him to perfect his appeal be made.

WOOD, MONTAGUE & MATTHIESSEN,

Attorneys for the Defendant, Clem Rogers.

The foregoing appeal allowed upon giving bond as required by law for the sum of \$500.00.

Dated June 27, 1922.

R. S. BEAN,  
District Judge. [44]

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AND AFTERWARDS, to wit, on the 27th day of June, 1922, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [45]

### **Assignment of Errors.**

Comes now the defendant in the above-entitled cause and files the following assignment of errors, upon which he will rely upon his prosecution of the appeal in the above-entitled cause from the decree made and entered in the District Court of the United States for the District of Oregon, on the 28th day of December, 1921:

1. The Court erred in failing to hold that Oregon Pacific Mill and Lumber Company was a necessary party defendant in the above-entitled suit.

2. The Court erred in proceeding to the trial of this cause over the objection of this defendant without joining the Oregon Pacific Mill and Lumber Company as a party therein.

3. The Court erred in entering a decree herein in favor of the plaintiff for the reason that the complaint fails to state facts sufficient to constitute a cause of suit by plaintiff against this defendant.

4. The Court erred in entering a decree herein in favor of the plaintiff against the defendant for the reason that the evidence is insufficient to support same.

5. The Court erred in failing to enter a decree herein in favor of the defendant and against the plaintiff.

6. The Court erred in holding that the complaint stated facts sufficient to constitute a cause of suit on behalf of the plaintiff as a judgment creditor of Oregon Pacific Mill and Lumber Company against this defendant because:

(1) There is no allegation that plaintiff requested the Oregon Pacific Mill and Lumber Company, or any of its officers or agents, to institute action or suit against this defendant, nor any allegation of facts excusing such demand. [46]

(2) The suit is brought on behalf of one creditor only and not on behalf of all creditors similarly situated.

(3) It is not alleged that the company was insolvent or, if insolvent, that the defendant had notice or knowledge thereof when the \$60,000 was received by him from the United States Spruce Production Corporation.

7. The Court erred in entering a decree herein in favor of the plaintiff against the defendant because:

(1) There is no evidence to show a demand upon the Oregon Pacific Mill & Lumber Company by plaintiff to institute any action or suit against this defendant, nor any facts excusing such demand.

(2) There is no evidence to indicate that the suit is brought in a representative capacity or otherwise than for plaintiff's sole interest.

(3) There is no evidence that the Oregon Pacific Mill & Lumber Company was insolvent or that the defendant had notice or knowledge of it insolvency when he received the funds from the United States Spruce Production Corporation.

8. The Court erred in deciding that any portion of the \$60,000.00 received by Rogers from the United States Spruce Production Corporation was the property of Oregon Pacific Mill & Lumber Company.

Dated June 26, 1922. [47]

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AND AFTERWARDS, to wit, on the 27th day of June, 1922, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit: [48]

#### **Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS, that we, Clem Rogers, as principal, and American Surety Company, a New York corporation authorized and qualified to do a general surety business within the State of Oregon and elsewhere, as surety, are held and firmly bound unto Brix Bros.



Logging Co., a corporation, the complainant in the above-entitled suit, in the sum of Five hundred dollars (\$500.00), lawful money of the United States, to be paid to it, its successors and assigns; to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our heirs, successors and personal representatives, by these presents.

Sealed with our seals and dated this 19th day of June, 1922.

The condition of this obligation is such that

WHEREAS, the above-named Clem Rogers is about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree made and entered in the above-entitled cause in the District Court of the United States for the District of Oregon;

NOW, THEREFORE, if the above-named Clem Rogers shall prosecute his said appeal to effect and answer all costs if he fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

CLEM W. ROGERS, [Seal]

Principal.

[Seal]

AMERICAN SURETY COMPANY OF  
NEW YORK,

By W. J. LYONS,

Resident Vice-President.

Attest: W. A. KING,

Resident Assistant Secretary.

W. J. LYONS,

Agent.

The within bond is approved both as to sufficiency and form this 27th day of June, 1922.

R. S. BEAN,  
District Judge. [49]

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AND AFTERWARDS, to wit, on the 25th day of July, 1922, there was duly filed in said court a statement of the evidence, which with the exhibits therein designated to be included are in words and figures as follows, to wit: [50]

#### **Statement of the Evidence.**

Defendant before the case proceeded to trial, objected to the Court's proceeding with the case at all on the ground that the bill of complaint is a bill to set aside as fraudulent the transfer of the property of the Oregon Pacific Mill & Lumber Company to defendant Rogers, the bill alleging that these transfers were made to him for the purpose of cheating and defrauding creditors of the Oregon Pacific Mill & Lumber Company, of which he was a treasurer, and the prayer of the bill being that this transfer be set aside and that Rogers be compelled to account for all moneys that he received, and that a decree be entered against him personally compelling him to pay this complainant on the ground that Rogers holds money of the Oregon Pacific Mill & Lumber Company which does not belong to him because the transfers to him were fraudulent; and defendant objected that the bill being framed as it was, the Oregon Pacific

Mill & Lumber Company was a necessary party defendant. The court overruled the objection.

### **Testimony of Max Church, for Plaintiff.**

MAX CHURCH, a witness for the plaintiff, testified in substance that he was an attorney by profession, living in Portland, and was a secretary of the United States Spruce Production Corporation, and that he was a recorder and a member of the Claims Board of the United States Spruce Production Corporation, and that he had been secretary of the corporation for about eighteen months and a member of the Claims Board for about a year. He produced and identified Plaintiff's Exhibit 2, which he said was filed with the Claims Board during the month of December, 1918. Said Plaintiff's Exhibit 2 is as follows:

#### **Plaintiff's Exhibit No. 2.**

“To the United States Spruce Production Department:

Presented herewith is the claim of Clem W. Rogers [51] in his own right and as assignee of the rights of the Oregon Pacific Mill & Lumber Co., for reimbursement for damages suffered by reason of the breach and cancellation by the United States of its contract with claimant.

The claim in this form is presented at the request of the United States Spruce Production Corporation as a basis of settlement, and the claimant reserves all legal rights.

In the nature of things the claim will have to be modified either in favor of or against the claimant

by reason of facts and figures which are not at this time at the disposal of the claimant.

In this petition it is proposed only to outline briefly and concisely the facts upon which it is based.

Upon representation of Government officials as to the great need by the Government for an immediate supply of airplane spruce, and based upon an order for a large quantity thereof, the claimant and his predecessors in interest caused to be organized the Oregon-Pacific Mill & Lumber Co., and the corporation secured in compliance with the order referred to a certain contract covering a period of eighteen months for the delivery of a large amount of said airplane spruce, according to certain specifications and at a price and under conditions named in the contract. For the sole and only purpose of manufacturing and delivering the said airplane spruce called for by said contract, and based upon the terms and conditions thereof, the claimant or his predecessors in interest purchased a large amount of timber, a mill and mill-site.

If in fact the government had permitted the Oregon-Pacific Mill & Lumber Company and the claimant to operate for the full eighteen months under the contract as originally [52] drawn it would have been enabled to amortize its investment and show a profit of  $18\frac{1}{2}\%$  on the gross business done within the period under the contract.

In fact, however, the Government saw fit to change the conditions surrounding the contract,

but failed to make the equivalent change in the price as required by the contract. At this time the Government seeks to cancel the contract.

Inasmuch as the claimant and his predecessors in interest entered in to this contract for the sole purpose of furnishing airplane spruce to the Government it is willing that said contract should be cancelled. The claimant does not ask the United States Government for any profit that he is able to show would have been made under the original contract, nor does he ask for any loss that he or his predecessors in interest may have suffered by reason of the change in condition ordered by the Government. The claimant does ask at this time to be made whole for the actual investment made for the sole and only purpose of furnishing to the Government spruce which it urgently needed, and to supply it was the sole reason of the investment made.

In arriving at the amount of the claim full credit has been given the Government for salvage in the way of timber, lumber, mill equipment, property, etc. remaining in the hands of the claimant.

Respectfully submitted,

(Signed) CLEM. W. ROGERS.

## CLAIM OF CLEM W. ROGERS.

Debits.

Money advanced on con-

tract .....\$345,000.00

Accounts payable ..... 40,584.42      385,584.42

Credits.

Salvage value of Invest-

ment ..... 100,000.00

Accounts receivable .. 59,693.21

Lumber on hand (est.).. 32,000.00    \$191,693.21

NET LOSS .....\$193,891.21''

[53]

The witness next produced and identified Plaintiff's Exhibit 3, which he said was filed with the Claims Board subsequent to Plaintiff's Exhibit 2, and which is as follows:

**Plaintiff's Exhibit No. 3.**

To the Contract Board of the United States Spruce Division.

Gentlemen:

In support of the claim, already filed with your Honorable Board, of Clem W. Rogers in his own right and as assignee of the Oregon-Pacific Mill & Lumber Company, I present herewith the following:

1. Certified Public Accountant's Report of Financial Transactions and Operations of Claimants' business.



2. Copy of Federal Trade Commission Order for making out Monthly Reports of the Industry.

3. Copy of U. S. Spruce Division Auditor's Estimate of operations of claimants mill,  
—to all of which references are made in this Statement.

Permit me to review the facts as placed before you as to this particular claim:—

ORIGIN:

In November, 1917, Charles W. Corbaley, one of the organizers of this Company, received the following letter:

WAR DEPARTMENT.  
OFFICE OF THE CHIEF SIGNAL OFFICER.  
WASHINGTON.

Nov. 13, 1917.

From: Major Chas. R. Sligh,

To: Mr. Chas. W. Corbaley,

Palace Hotel,

San Francisco, California.

SUBJECT: Spruce Tract.

1. In confirmation of our conversation regarding the seventy million feet of spruce upon which you have an option, would state that this Division will contract with you for your entire [76] product of aircraft spruce in accordance with our specifications No. 1 at a price of \$105.00 per thousand feet, f. o. b. Mill.

2. If, for any reason, a modification of these specifications is made, you will have the option of taking advantage of such modification if you so desire.

3. We will enter into a contract with you extending over a period of eighteen months for the sawing and delivering of this lumber.

4. We would also give you a contract for delivery within the next four or five months for a certain quantity of aircraft fir, the exact quantity we cannot state, but this office at this time has requisitions for a larger amount than they can supply immediately.

5. In accordance with an Act passed by the last Congress, the Government is authorized to make advances up to 30 per cent of the amount of the contract, provided that satisfactory security is furnished for these advances: these advancements to apply on the purchase price.

6. Colonel B. P. Disque, or Captain Russell Hawkins, Representative of the Signal Corps, Yeon Building, Portland, Oregon, have authority to make contracts in accordance with the above.

By direction of the Acting Chief Signal Officer.

(Signed) CHAS. R. SLIGH,

Major, Signal Corps.

#### CONTRACT:

Based thereon, the Oregon-Pacific Mill & Lumber Company was incorporated in December, 1917, and at once proceeded to acquire spruce and fir timber at war appreciated prices in Clatsop County, Oregon, for the sole purpose of cutting spruce [77] for the U. S. Spruce Production Division, and, on December 22, 1917, executed the Contract, known as No. SPD-#4. The Contract was to run from December 1917 to July 1919, and

was for ten million feet of spruce at \$105.00, and included the following articles:

“Art. VII. The Government hereby reserves the right to any time during the period covered by this contract to change, alter, and amend the Standard Specifications No. 1 attached to this agreement in such particulars as it may deem advisable, provided, however, that if any change or changes in grade or specifications hereto attached are made by the Government, it is agreed that a corresponding change shall be made in the price. The Seller agrees that it will comply with all the terms of such specification as changed, altered or amended by the Government.”

“Art. VIII. It is further understood, contracted and agreed that in view of the situation attempted to be met by this and similar contracts and the emergency now existing calling for the delivery of a large amount of spruce to satisfy the Government's needs, that the Seller will, from and after the signing of this Contract, run and operate its mill to its fullest capacity, running night and day shifts, if possible, and necessary, and that he will, during the period covered by this contract buy all logs suitable for construction in airplanes offered by any logger or producer without discrimination on account of the individual or for any cause and will pay therefor the full price as set and determined by the Government, the quantity and quality to be governed by the grading rules established by the Government.”

“Art. VII. provides that in event of any change made by the Government, a corresponding change will be made in [78] price, and Article VIII. provides for buying airplane logs offered by any logger at full Government price, in accordance with Government grading rules.”

To acquire said timber and the mill to fulfill the Government's Contract as per Specifications, required a total investment of \$320,787.63, as shown by attached accountant's report.

The claimant undertook this work solely as a war measure for the benefit of the Government; having no wish or desire to enter the Commercial Lumber business; and would not have undertaken it except to help the Government output of spruce for aeroplanes. Hence, no effort was made (as it carried out only Government Contracts) to create a general sales organization for future activity on commercial lines. The “side-cut” was being disposed of at intervals, but was considered simply as such, and no effort was made to perpetuate the organization after the war. It was figured that operation for the Government for the 18 months contracted for would, at then existing prices and conditions, fairly reimburse the claimant investors and perhaps bear a small per cent of profit at the end.

#### OPERATIONS:

The claimant at once proceeded to operate and was buying spruce logs in Astoria (where the Mill is situated) at average price of \$22.50 per M, with the idea of doing so until it could get railroad

facilities into its timber and then to log and use its own logs. The price of \$22.50 was fixed by the Government authorities as follows: #1-\$35.00, #2-\$20.00, #3-\$11.00 per M. plus water haul.

When commencing in January, 1918, the labor situation was that men were working ten hours shift, and at current wages claimant's cut showed gain of \$7.25 per M. But, as of [79] March 1, 1918, the authorities changed pay rates and hours increasing pay and reducing time to eight hours, which made a difference in labor cost of \$1.60 per M or about 25%. Further, on or about April 1, 1918, the Government ordered claimant to cut Cants instead of airplane stock, at price of \$100.00 per M. During April, this was done and all cants so cut were billed to the Government at \$100.00 per M; but later the Government paid at the rate of only \$7,500 for that lot, demanding and receiving credit for the difference.

Thereafter, as of May 1st, 1918, the Government set the following prices on Spruce Cants: #1-\$90.00, #2-50.00, #3-\$30.00. This made differences as follows between the original Contract basis, and the changes ordered.

A—ORIGINAL BASIS SALES: (10 hours	
day) .....	\$41.77
12% at \$105.00, 29% at \$65.00	
and 59% at \$17.50.	
COSTS: .....	34.52
Logs (at Government prices) .	.22.50
Milling (as per Government	
Auditor) .....	12.02
<hr/>	
Gain per M .....	7.25
B—SALES PER M. (after Changes Or-	
dered) .....	33.60
Cants #1 & #2—28% at \$75.00	
Box and Better—72% at \$17.50	
Very few #3 Cants taken by Gov-	
ernment .....	
Costs per M (as above) .....	34.52
<hr/>	
	.92
Additional Cost of Labor, as above	1.60
<hr/>	
Net loss to mill per M (8 hours day)	2.52
<hr/>	
<hr/>	

When, after operating a short time under Specification No. 1, the Government required the Oregon-Pacific Mill & Lumber Company to cut cants instead, also increasing labor cost [80] 25 per cent by reduction of hours and new wage scale, the Government did not make a corresponding increase in price as provided for in the contract. Buying logs as provided in Art. VIII. at Govern-



ment price and scale, a mill must operate at a loss under these conditions. About April 1, 1918, the Government also ordered discontinuance of sale of "G List," for which they were paying the claimants \$65.00 per M. This reduced the company's activities to cutting spruce cants for the United States and selling side-cut as box lumber.

Late in the summer, the Government put an embargo on eastern shipments, by which claimants were further handicapped in realizing on "side-cut," as most of its sales other than to the Government were to far Eastern points. This left the claimants with over three million feet of spruce on hand when operations were ordered stopped. There was and is, no demand to speak of for this lumber except in the East.

#### TIMBER:

In accordance with the agreement contained in the letter quoted herein from Major Chas. R. Sligh on behalf of the Acting Chief Signal Officers, dated November 13, 1917, the claimants purchased properties in Clatsop County Oregon, to carry on its contract with the Government (which contract provided for cutting 60% spruce and 40% fir) consisting of: 16 million feet spruce, 10 million feet fir, 16 million feet hemlock, and an idle mill in Astoria, upon which a considerable amount of money was expended to put same in working condition.

Claimants were prepared to cut and saw their own logs and had they been allowed to do so, they

would have amortized their purchase price as follows:

Cost of logging and hauling to the river (as per estimates received before purchasing property) \$9.00 per M. [81] The average cost of spruce logs purchased at Government prices was \$24.00 per M. (See Government Auditor's Report.) The average cost of fir logs at prices fixed by the Government was \$15.00 per M.

16 million feet of spruce at \$24.00.....\$384,000.00

10 million feet of fir at 15.00..... 150,000.00

---

\$534,000.00

Less cost of logging at \$9.00..... 234,000.00

---

\$300,000.00

Stumpage value of 16 million feet of  
hemlock

16,000.00

---

\$316,000.00

The above statement will show that the receipt on the timber of \$316,000 would amortize the purchase price of \$275,000 and paid for the improvements and repairs necessary to put the mill in working order, which approximates \$45,000, making a total investment of some \$320,000.

The claimants received the following letter from the War Department of the Spruce Production Division, Bureau of Aircraft Production, in which the Government commandeered all their timber, making it impossible for claimant to recover purchase price of property.

Portland, Oregon, Yeon Building,

August 22, 1918.

From: Manager of Government Operations.

To: Oregon Pacific Mill & Lumber Co.,  
Astoria, Oregon.

SUBJECT: Selective Logging Contract.

1. The Government is about to enter upon the NW  $\frac{1}{4}$  of Section 21-6-9; the W  $\frac{1}{2}$  of the NE  $\frac{1}{4}$ , S  $\frac{1}{2}$  of the NW  $\frac{1}{4}$ , SW  $\frac{1}{4}$ , and NW  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Section 23-6-9; and the SE  $\frac{1}{4}$  of Section 22-6-9, Clatsop County, and would like to know if you intend to sign the Contract submitted by the Grant Smith-Porter Bros. Company covering this timber. If you do not do so, we will have to commandeer the same immediately. In case we are forced to do this, you will have to prove your value in court and also will undoubtedly be delayed for a considerable length of time before you will be reimbursed [82] for your timber.

2. We wish to urge upon you the signing of this contract, in that the Government needs spruce and we must take yours, and would much rather do so with your permission than by forcing the issue.

By direction of Colonel Disque:

REUBIN HITCHCOCK,

RH: H.

Major A. S. P."

Some mills made money on account of having their own logs, but mills buying logs should not be penalized on account of this fact.

The cost of operation in nearly all the mills is approximately the same, and the average selling price of manufacturing lumber is about the same,

so that the profit or loss to mills in different localities is due only to difference in price and grade of logs. That is a mill securing logs below the Government price can make money, while a mill following the terms of the contract and paying Government prices can lose money.

#### CANCELLATION:

On November 11, 1918, notice was given by the Government of Cancellation of *all* Contracts, and instructions to file claims. Thereupon, claimant filed his claim with your Board, and claims herewith that a continuation of activity for the Government would have enabled claimants as already stated, to reimburse themselves for the outlays of borrowed and invested capital as exhibited.

#### FUTURE:

The Mill is adaptable, in its present state, to Government activity only, and would require further investment of at least One Hundred Thousand (\$100,000.00) Dollars for Box Factory, Planing Mill and other additions and changes, to make it useful as a commercial venture. It had been idle for over a [83] year prior to claimants' purchase, owing to its box factory, planing mill, kilns and other necessary parts being destroyed by fire in 1916.

#### TAXES AND DEPRECIATION:

It is to be noted that attached certified report showing investment and values, does not include as an entry, any taxes or depreciation.

Based on attached copy of Government Spruce

Division Auditor's Comments claimant respectfully refers therein to page 2, paragraph 3.

#### TAXES:

"1917 figures were not considered equitable for this operation as mill was idle during this period. Taxes were estimated at \$12,000.00, which, on the basis of a cut for the year of 24,000,000" (also estimated), amounts to 50¢ per M. In explanation of the apparently high estimate for taxes, it might be well to call attention to the fact that this mill is located in a city and consequently will have items of street improvement, sewer and other assessments which an outside mill would not have to consider.

#### DEPRECIATION:

This is referred to in attached Federal Trade Commission instructions, Page 7, Line 37, which is as follows:

"This account shall include such charges, based upon the plant investment and life of the standing timber as will at the date of timber exhaustion constitute a fund that will equal such investment, less scrap value. The present life of the timber operation shall *not* be taken as the remaining life, but must date from the purchase of the timber by the present company. Depreciation on stores, dwellings and non-lumber manufacturing property must be excluded from this account. For example: The plant cost \$400,000 and the estimated salvage value at the [84] end of the life of the property is \$50,000. The net loss in plant would be \$350,000. If the original stumpage holdings amounted to

350,000,000 feet log scale, said footage divided into the plant loss would show a depreciation of extinguishment of \$1.00 per M. feet log scale as stumpage was cut."

"Depreciation of sawmilling equipment on account of wear and tear is found by deducting from the original cost of the equipment its residual or scrap value, and dividing this difference obtained by the estimated life of the equipment. A percentage method can be used which when applied to the net book value of the machine will leave only the scrap value of the machine on the books at the expiration of its estimated life."

It is to be noted that claimant, in claim filed has allowed as at present "Scrap value," One Hundred Thousand (\$100,000.00) Dollars, which is far greater than would have been figured on basis of said Federal Trade Commission instructions—which shows there is no desire on part of claimants to request more than a very just allowance thereon.

It is also to be noted on Page 1 of said Government Auditor's memorandum—"cost of Logs . . . . \$24.00," whereas claimant has calculated same herein at \$22.50, being 1.50 difference per M.

Reference is also hereby made to General Explanation on Page 3 of said memorandum report—particularly to last paragraph regarding handling and disposition of side-cut.

Claimants respectfully submit:

1. That they entered into said Contract herein referred to at the instigation of the Government.
2. That, in addition to the original investment



of \$278,000.00, they expended approximately \$60,000.00 in building [85] barracks, cook-house, and repair work of all kind in order to carry out the terms of said Contract.

3. That they purchased said property and made said improvements only after they had accepted said Contract.

4. That the various changes in prices and labor conditions made at request of Government made it impossible for claimants to operate its property at a profit sufficient to take care of the heavy depreciation and taxes.

5. That the timber lands were acquired at war prices for the purpose of executing the Government Contract, but were commandeered by the Government without adequate compensation.

6. That the claimant is at present losing approximately \$2,000.00 per month, cost of insurance, watchman, taxes, interest, etc., on the mill, which is idle.

Claimants are not at this time asking for the profit which they feel they are undoubtedly entitled to, they are not even asking for a reasonable rate of interest on their investment or the loss incurred through the cancellation of the Contract, but they feel that they are legally, morally and *equitable* entitled to be reimbursed in the amount of said claim.

Respectfully yours,

(Signed) CLEM W. ROGERS. [86]

The witness next produced and identified Plaintiff's Exhibit 4, which is as follows:

**Plaintiff's Exhibit No. 4.**

A. Porter Robinson

B. W. Bours

ROBINSON and BOURS,  
Certified Public Accountants,  
Merchants National Bank Building.

#44-46

San Francisco, Cal., December 24, 1918.

C. W. Rogers, Esq.,

San Francisco, California.

Dear Sir:

Acting under your instructions, we have made an investigation of the books and records of the Oregon Pacific Mill & Lumber Company, a Nevada Corporation, and the Clatsop County Lumber Company, who acquired certain of its properties, from the organization of the Oregon Pacific Mill & Lumber Company as at November 28, 1917, to November 30, 1918. For the purposes of greater clarity we have included, however, certain transactions which actually occurred in the month of December, 1918.

It is understood that we have made no audit of these accounts, and that our attention has been directed solely toward the preparation of Statements, which, eliminating the changes in ownership and management, would show the dealings with these Properties since their original acquirement from the Clatsop Mill Company, the subsequent operations, and the status thereof as at November 30, 1918.

We now beg to present our Report as follows, which, subject to the explanations in the General Report hereinafter, we certify to have been correctly prepared from the books and records:

COMBINED STATEMENT OF ASSETS & LIABILITIES, Nov. 30, 1918.

COMBINED PROFIT & LOSS ACCOUNT, Nov. 28, 1917, to Nov. 30, 1918.

ANALYSIS OF COMBINED STATEMENT OF ASSETS & LIABILITIES, COMBINED NET CAPITAL INCOME & EXPENDITURE ACCOUNT, Nov. 28, 1917, to Nov. 30, 1918.

We remain, Dear Sir,

Faithfully yours,

ROBINSON and BOURS,

Certified Public Accountants.

This report consists of 12 pages, each one initialed APR. [87]

OREGON PACIFIC MILL & LUMBER COMPANY, A CORPORATION.  
CLATSOP COUNTY LUMBER COMPANY,  
COMBINED STATEMENT OF ASSETS & LIABILITIES—November 30, 1918.

ASSETS.

CURRENT ASSETS:

Cash

\$110,391.55

Accounts receivable

Schedule #1 6,493.54

Notes receivable

" 2 67,283.01

Lumber Stock

" 3 2,004.05

Bonds

" 4 34,110.95

PLANT & PROPERTIES

" 5 500.00

INSURANCE UNEXPIRED

320,387.63

2,283.66—433,062.84

## LIABILITIES.

## CURRENT LIABILITIES:

Accounts Payable

65,318.32

Estimated Freight

31,090.97

Taxes Payable

25,539.50

8,687.85

315,000.00

CLEM W. ROGERS

25,000.00

CAPITAL INVESTED

27,744.62—433,062.84

PROFIT &amp; LOSS

APR. [88]

COMBINED PROFIT & LOSS ACCOUNT.  
NOVEMBER 28, 1917, TO NOVEMBER 30, 1918.

Without Consideration of Accrued Taxes or

Depreciation.

	Oregon Pacific Mill & Lumber Co. Nov. 28, 1917, to Sept. 30, 1918. \$430,631.78	Clatsop County Lumber Company Oct. 1, 1918 to Nov. 30, 1918. 87,761.93	Total
NET SALES			518,393.71
COST OF SALES:			
Log Supply	293,331.56	38,370.01	331,701.57
Water Haul & Pond Expense	8,908.94	832.43	9,741.37
Saw Mill Expense	48,608.43	13,565.63	62,174.06
Yard Expense	45,384.07	7,537.01	52,921.08
Cook house	2,684.66	952.26	3,636.92
Office & General Expense	27,641.95	3,561.64	31,203.59
Insurance	18,797.29	2,241.25	21,038.54
Total	445,356.90	67,060.23	512,417.13



Lumber Inventory Adjustment		
Cost of Sales		Total
OPERATING PROFIT		34,110.95
SUNDRY EARNINGS		478,306.18
TOTAL PROFIT		40,087.53
INTEREST PAID		1,549.92
NET PROFIT		41,637.45
APR. [89]		13,892.93
		27,744.52
	Oregon Pacific Mill & Lumber Co. Nov. 28, 1917, to Sept. 30, 1918. 46,759.15	Clatsop County Lumber Company Oct. 1, 1918 to Nov. 30, 1918. 12,648.20
	398,597.75	79,708.43
	32,034.03	8,053.50
	1,549.92	
	33,583.95	8,053.50
	13,892.93	
	\$ 19,691.02	8,053.50

ANALYSIS OF COMBINED STATEMENT OF  
ASSETS & LIABILITIES.

Schedule #1.		
CASH.		\$ 6,493.54
Oregon Pacific Mill & Lumber Company	772.10	
First National Bank, San Francisco		
Clatsop County Lumber Company		
Office Fund	4,137.25	
Wells Fargo Nevada Nat'l Bank, S. F.	834.02	
Astoria Savings Bank	750.17	
ACCOUNTS RECEIVABLE	Schedule #2.	67,283.01
Oregon Pacific Mill & Lumber Company		15,516.55
Brix Sand & Lumber Co.	4,631.19	
Wm. Lloyd Co.	3,897.72	
Dant & Russell	2,380.69	
Cartier-Holland Lumber Co.	1,179.50	
Chas. W. Corbaley	1,156.25	
Chicago Mill & Lumber Co.	622.09	

U. S. Shipping Board	606.35	
U. S. Signal Corps	485.39	
Dutton Lumber Co.	319.41	
National Tank & Pipe Co.	143.64	
Farvest Milk Products Co.	94.32	
Clatsop County Lumber Company		51,766.46
U. S. Signal Corps	15,362.68	
Dant & Russell	11,746.82	
Brix Sand & Lumber Co.	5,384.02	
Wm. Lloyd Co.	4,291.44	
U. S. Navy	3,355.35	
Hutchins Lumber & Storage Co.	3,274.16	
G. W. Gates Co.	2,678.64	
Oregon Box Mfg. Co.	1,805.35	
O. P. Menefee Lumber Co.	1,709.89	
Cartier-Holland Lumber Co.	1,117.97	
A. E. Lane Lumber Corp'n	800.85	

Ross Higgins Co.	206.09		
Peter F. Brock	25.20		
National Tank & Pipe Co.	8.00		
NOTES RECEIVABLE	Schedule #3.		2,004.05
Oregon Pacific Mill & Lumber Co.		2,004.05	
Brix Sand & Lumber Co.	2,004.05		
LUMBER STOCK	Schedule #4		34,110.95
Clatsop County Lumber Co.		34,110.95	
Lumber 1,917,083 ft. @ \$17.50		33,548.95	
Lath 281,000 Pes. @ 2.00		562.00	
		\$ 500.00	

# ANALYSIS OF COMBINED STATEMENT OF ASSETS & LIABILITIES.

	Schedule #5.	
BONDS		\$500.00
Clatsop County Lumber Co.	500.00	
U. S. Liberty Loan		
PLANT & PROPERTIES	Schedule #6.	320,387.63
Purchased from Clatsop Mill Company		
Principal	275,000.00	278,536.00
Cash Payments	266,312.15	
Tax Liability As-		
sumed	8,687.85	
Interest	3,536.00	

“That certain sawmill plant together with all mill appliances known as the Clatsop Mill Company’s sawmill plant situated in the City of Astoria, County of Clatsop, State of Oregon, together with all lands and premises upon which the same is located and including timber and all lands owned by the Clatsop Mill Company, situated in said County and State such being used and occupied in operating said sawmill and specifically described as follows:

DESCRIPTION: Block 144, 145, part of block 146 and two tracts of waterfront land adjoining on the North which extend to the established bulkhead or property line, in Shiveley’s Addition to Astoria.

Said sawmill plant to include all machinery and equipment, the office building and furniture and all trucks of the Clatsop Mill Company at Astoria, Oregon, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, also the following described real estate, to wit:

S $\frac{1}{2}$ of S $\frac{1}{2}$ .....	Section 15,	160 acres
NW $\frac{1}{4}$ of .....	“ 21,	160 “
SE $\frac{1}{4}$ of .....	“ 22,	160 “
SW $\frac{1}{4}$ of .....	“ 23,	160 “
NW $\frac{1}{4}$ of SE $\frac{1}{4}$ .....	“ 23,	40 “
W $\frac{1}{2}$ of NE $\frac{1}{4}$ .....	“ 23,	80 “
S $\frac{1}{2}$ of NW $\frac{1}{4}$ .....	“ 23,	80 “
N $\frac{1}{2}$ of NW $\frac{1}{4}$ .....	“ 26,	80 “
SE $\frac{1}{4}$ of NW $\frac{1}{4}$ .....	“ 26,	40 “

Total

960 “



Except a certain piece previously deeded to Willamette Pulp and Paper Company of 40 acres more or less.

All in Township 6 N., R. 9 W. of the Will. Mer., in Clatsop County, State of Oregon, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging."

Frd. 278,536.00 [91]

# ANALYSIS OF COMBINED STATEMENT OF ASSETS & LIABILITIES.

Betterments & Preliminary Expense		Brt Ford	278,536.00
Sprinkler System			60,899.32
Grinell Auto Sprinkler Equipment,			
Contract	18,900.00		
Allowances	1,422.50		
Tank			25,513.74
Pipe Fittings, etc.			
Labor			
Installation	451.78		
Wrecking old boiler			
setting	110.00		
Mill Machinery & Equipment			9,893.03
Saws & Knives			
Chains, Grate Bars & Miscellaneous			
Belts & Packing			
			6,549.03
			2,285.27
			615.12

Hose, Extinguishers & Fire Buckets	443.61	
Engine Repairs		6,471.30
Fly Wheel	2,225.05	
Labor	1,206.11	
Miscellaneous Supplies	1,181.40	
Waterking	1,025.44	
Governor	833.30	
Barracks		3,789.36
Labor	1,481.31	
Plumbing	1,337.69	
Lumber & Flooring	404.65	
Hardware & Elect. Eqp't.	329.96	
Doors & Windows	159.15	
Flags	76.60	

Wharf		2,688.37	
Makela & Wuopio Contract	1,578.98		
Lumber	1,109.39		
Pony Band		2,065.77	
Purchase Cost	1,400.00		
Plans	250.00		
Installation	156.03		
Freight	154.74		
Services re Purchase	105.00		
	Frtd.	50,421.57	339,435.32
			APR. [92]



Chemical Engines		217.50
2 #20, 20 gal. Amer. La		
France—Champion Chemical		
Fire Engines	200.00	
Hose	17.50	
Motor		200.45
7½ H. P. "An" Motor	200.45	
Miscellaneous Preliminary Exp.		6,450.92
Labor	2,470.27	
Organization Expense	1,156.94	
Jno. J. O. O'Toole	484.09	
C. W. Corbaley	400.25	
F. Dohrmann, Jr.	272.60	
Legal Expense	655.60	
Premium U. S. Bond	500.00	
Whitewashing Mill Floor &		



graveling roof	483.45	
Elec. Equipment, Yard	387.47	
Repairs to Boilers sold (see below)	281.85	
Watchmen, Preliminary Period	276.28	
Miscellaneous	239.06	
Less:		19,047.69
Stumpage sold		14,257.69
Old Boilers		3,000.00
Rail, Shaftings & Misc'l Scrap		1,790.00
APR. [93]		

# ANALYSIS OF COMBINED STATEMENT OF ASSETS & LIABILITIES.

## Schedule #7.

ACCOUNTS PAYABLE		
Oregon Pacific Mill & Lumber Co.		27,812.05
Brix Bros. Logging Co.	15,136.41	
F. Dohrmann, Jr.	7,999.96	
National Tank & Pipe Co.	1,550.00	
Pacific Fire Extinguisher Co.	1,165.00	
Title Ins. & Guar. Co.	700.00	
Suspense	552.38	
J. W. McDonald	468.75	
F. Howard Allen Co.	179.10	
Farwest Milk Products Co.	60.45	
Clatsop County Lumber		3,278.92
U. S. Government	688.13	
Astoria Box Co.	323.68	
Clem W. Rogers	250.00	
		\$31,090.97

Union Meat Co.	241.12
Ross Higgins Co.	206.45
Sunflower Dairy Co.	180.90
Frye & Co.	160.19
Prael Eigner Tr. Co.	150.50
Allen & Lewis	140.90
Farwest Milk Products Co.	106.22
Atlantic Paint Co.	104.00
Standard Oil Co.	89.70
Fisher Bros. Co.	83.80
Ewart Electric Co.	81.01
Lovell Auto Co.	79.20
Simonds Mfg. Co.	79.03
Collins Market	70.97
H. M. Killian	50.87
Allis-Chalmers Co.	50.00

Marshall-Wells Co.	47.05	
M. M. White	50.00	
Hospital	45.20	
ESTIMATED FREIGHT		25,539.50
Oregon Pacific Mill & Lumber Co.		
	9,889.16	
Clatsop County Lumber Co.	15,650.34	
	..	
Schedule #9.		8,687.85
TAXES PAYABLE		
Clatsop County Lumber Co.		8,687.85
Tax Liability assumed by Ore.-Pac. M. & L. Co., upon purchase of Properties from Clatsop Mill Co., and subsequently transferred to Clatsop County Lumber Co.		

[94]

APR.

# ANALYSIS OF COMBINED STATEMENT OF ASSETS & LIABILITIES.

Schedule #10.

## CAPITAL INVESTED

Oregon Pacific Mill & Lumber  
Co.

Capital Stock issued

Less issued for Intangible  
Property

Agreement with U.

S. authorities to  
execute a Con-  
tract,

110,000.00

Option on Prop-  
erties of Clatsop

Mill Co.

Incorporators

shares

APR. [95]

25,000.00

151,000.00

126,000.00

\$25,000.00

# COMBINED NET CAPITAL INCOME & EXPENDITURE ACCOUNT.

NOVEMBER 28, 1917, TO NOVEMBER 30, 1918.

CAPITAL INCOME: \$433,062.84

Capital invested 25,000.00

Advanced by C. W.

Rogers 315,000.00

Other liabilities in-

curred 65,318.32

Operating Profit 27,744.52

CAPITAL EXPENDITURE: 433,062.84

Invested in Plant &

Properties 320,387.63

Invested in Current

& Miscellaneous As-

sets 112,675.21

APR. [96]

## GENERAL REPORT.

The Oregon Pacific Mill & Lumber Company, a Nevada Corporation, was organized November 28, 1917. The first Directors' Meeting was held December 8, 1917, on which date \$125,000.00 Par Value Capital Stock was authorized to be issued to Mr. C. W. Corbaley, \$15,000.00 thereof for the assignment of an option for the purchase of the properties of the Clatsop Mill Company and \$110,000.00 for the purchase from C. W. Corbaley of an agreement between himself and the constituted authorities of the United States, expressing their readiness to execute with him a contract for One Million feet of Spruce, cut to Government Specifications, per month, at a price of One Hundred



and Five Dollars per thousand feet, for a period of eighteen months commencing December 1, 1917. One thousand Dollars (\$1,000.00) Par Value Capital Stock had been issued as Incorporators Shares, which made a total of \$126,000.00 Par Value Capital Stock issued for intangible property. For the purpose of this report, we have entirely eliminated this Stock, and show as Capital Invested \$25,000.00 which was actually paid in in Cash.

On January 8, 1918, a certain Contract was made between the Corporation and Mr. Clem W. Rogers whereby, in consideration of the advance of at least \$300,000.00, and to secure the repayment of same under certain specified conditions, all the properties of the Corporation, real, personal and mixed were transferred and assigned to Mr. Clem W. Rogers. The corporation did not fully comply with the conditions of this Contract in so far as the time of repayments of money advanced, and in the month of September, 1918, certain of the properties of the Corporation came into possession of Mr. Clem W. Rogers, Grantee, and from October 1, 1918, these properties have been operated by Mr. Rogers [97] in the name of the Clatsop County Lumber Company.

For the purposes of this Combined Report we have eliminated the book valuations placed upon the properties when they were taken over by Mr. Clem W. Rogers, which valuations have entered into the books of the Clatsop County Lumber Company, and have exhibited the dealings with these properties since their original acquirement from

the Clatsop Mill Company as if no change in ownership and management had occurred.

In the books of the Oregon Pacific Mill & Lumber Company expenditures of considerable amount, which were in the nature of either of Betterments or Preliminary Expense, properly Capital Expenditure, had been charged as Operating Expenses. We have abstracted these items where it seemed proper to do so, revised the Profit & Loss Account accordingly, and included them in Schedule #6 hereinbefore, where they can be reviewed in complete detail.

In regard to the Net Profit of \$27,744.52 exhibited, particular attention is directed to the fact that this is without consideration either of Accrued Taxes or Depreciation.

ROBINSON AND BOURS,

Certified Public Accountants.

APR. [98]

The witness next produced and identified Plaintiff's Exhibit 5, which is as follows:

**Plaintiff's Exhibit No. 5.**

SIGNAL CORPS, UNITED STATES ARMY—

Contract No. SPD-4.

**CONTRACT FOR SPRUCE LUMBER.**

THESE ARTICLES OF AGREEMENT, entered into this twenty-second day of December, 1917, by and between Oregon Pacific Mill & Lumber Co., a corporation organized and existing under the laws of the State of Nevada and located at Astoria, Oregon, hereinafter called the "Seller" and

the United States of America, hereinafter called the "Government" represented by J. Van D. Crisp, First Lieutenant, Signal Corps of the United States Army, hereinafter called the "Contracting Officer," and under the direction of the Secretary of War, Witnesseth:

WHEREAS, Congress having declared by joint resolution, approved April 6, 1917, that war exists between the United States of America and the Imperial German Government, constituting a national emergency; and

WHEREAS, on September 7, 1917, under the provisions of Section 120 of an Act of Congress relating to national defense, approved June 3, 1916, the President, acting through the Secretary of War, commanded that all orders placed with the Seller by the Equipment Division of the Signal Corps be fulfilled and required that said Seller proceed with all possible haste with the production of spruce lumber for the manufacture of airplanes in accordance therewith, and with the further requirement that the Seller give preference to such orders over all other orders and contracts of said Seller:

Now, therefore, under the provisions of said Section 120 of an Act of Congress relating to national defense, approved June 3, 1916, and in accordance with the foregoing command, the President hereby places an order with the Seller with the requirement that it comply with the contract hereinafter set forth, and [99] in consideration of the mutual agreements herein contained, the par-

ties hereto have agreed and by these presents do agree to and with each other as follows:

ARTICLE I. The Seller hereby sells to the Government and the Government hereby purchases from the Seller, in accordance with the terms and conditions hereinafter set forth Ten Million (10,000,000) feet of spruce lumber within the period of eighteen months next ensuing which shall conform in all respects to the requirements and provisions of Standard Specifications No. 1 hereto attached, or such modification thereof as the Government shall hereafter from time to time adopt.

ARTICLE II. The Seller agrees to deliver five hundred & sixty thousand (560,000) or more of said spruce, during each month, commencing with the month of January, 1918, and continuing until the expiration of this contract. Time is of the essence of this agreement, and in the event that for any reason deliveries in any months shall be less than five hundred & sixty thousand board feet, (560,000), the Government may elect not to accept any deficiency, but if such election be not made in writing, delivered to the Seller within ten (10) days after the end of the month in which any such deficiency occurs, the deficient amount shall be delivered in the next succeeding month following that in which the deficiency occurred or as soon thereafter as possible, which the Government agrees to accept. The deficiencies, however, will not be accepted by the Government after the expiration of the period covered by this agreement. The Seller shall not be held liable for delays in deliv-

eries caused by strikes, fires, floods, riots, acts of God or the public enemy, or any other cause beyond the control or without the fault of the Seller, provided that nothing [100] herein contained shall impair the Government's right herein given to refuse to accept any deficiency in deliveries in any month.

ARTICLE III. Deliveries of said spruce shall be made by the Seller to the Government free on board cars at the mill of production, but if the Government shall notify the Seller within a reasonable time in advance of its intention to ship any part of said spruce by water, and the Seller's mill be adjacent to water, the delivery of that part of said spruce shall be free alongside ship at mill of production, but any lighterage charge or any expense or rehandling after delivery as above specified shall be paid by the Government.

If said delivery is to be made on board cars, said spruce lumber shall be loaded by the Seller on cars, each course being of uniform thickness, with  $\frac{3}{8}$ " thick cross sticks not more than four feet apart between each layer, and the ends butted. Each entire carload shall be protected by a sound board top cover of one inch lumber with joints battoned, fastened together with cross bats and nails, and placed securely under top binders, but not fastened to the car stakes. No nails shall be driven into Spruce lumber.

The Government shall have preference of all flat and open top or gondola cars furnished to the Seller for delivering the spruce lumber herein



contracted for, and the Seller agrees that such open or gondola cars will be used in shipping the spruce lumber whenever it is possible to obtain the same.

ARTICLE IV. All said spruce lumber to be delivered under this contract shall be inspected at the time of delivery as to compliance with the specifications hereto attached, or such modification thereof as the Government shall adopt, and as to measurement, [101] at the mill of Seller by inspectors authorized by the government, which inspection shall be final. The Government hereby reserves the right to refuse, and to mark the letters "C. S." in crayon on any spruce lumber found on such inspection not to be in compliance with specifications hereto attached, or such modification thereof as the Government shall adopt. The Seller shall provide such grading in advance of inspection by inspectors authorized by the Government as will facilitate said inspection.

ARTICLE V. The price to be paid for such spruce lumber to the Seller by the Government shall be One Hundred & Five & no/100 Dollars—(\$105.00) per one thousand (1000) board feet, based on measurements noted in specifications hereto attached, or such modification as the Government shall adopt.

ARTICLE VI. Payments shall be made for spruce lumber so delivered within a reasonable time after the presentation to the Officer in Charge of Disbursing Sec., Spruce Prod. Div. of the Signal Corps, or of his duly authorized representative,



hereinafter called the "Disbursing Officer" of Seller's invoice, including piece tally manifests, documents showing delivery free on board cars or free alongside ship at mill of production, and certificate of inspection executed by inspectors authorized by the Government, certifying to the measurement of the lumber so delivered and its compliance with specifications hereto attached, or such modification as the Government shall adopt, and upon a voucher wherein the said disbursing Officer shall certify the amounts to be so paid, and that the same have been determined by him to be due and payable to the Seller in accordance with the provisions of this contract.

All other payments which may become due to the Seller under this contract shall be made as soon as possible [102] after the same shall become due, upon a voucher wherein the Disbursing Officer shall certify the amount to be so paid, and that the same have been determined by him to be due and payable to the Seller.

ARTICLE VII. The Government hereby reserves the right at any time during the period covered by this contract to change, alter and amend the Standard Specifications No. 1 attached to this agreement in such particulars as it may deem advisable, provided, however, that if any change or changes in grade or specifications hereto attached are made by the Government, it is agreed that a corresponding change shall be made in the price. The Seller agrees that it will comply with

all the terms of such specification as changed, altered or amended by the Government.

ARTICLE VIII. It is further understood, contracted and agreed that in view of the situation attempted to be met by this and similar contracts and the emergency now existing calling for the delivery of a large amount of spruce to satisfy the Government's needs, that the Seller will, from and after the signing of this Contract, run and operate its mill to its fullest capacity, running night and day shifts, if possible, and necessary, and that he will, during the period covered by this contract, buy all logs suitable for construction in airplanes offered by any logger or producer without discrimination on account of the individual for any cause, and will pay therefor the full price as set and determined by the Government, the quantity and quality to be governed by the grading rules established by the Government.

ARTICLE IX. It is further contracted and agreed that the Seller shall saw, manufacture and deliver the lumber herein contracted [103] to be delivered in a good and workmanlike manner and to the satisfaction of the Government. And if at any time the Government should determine that the Seller is not complying with this clause of the contract, the Government may at once terminate this contract and decline to receive any more lumber from the Seller.

ARTICLE X. Neither this contract nor any interest therein shall be transferred as assigned by the Seller to any person, firm or corporation, with-

out the written consent of the Government, and in case of such transfer, without its written consent, the Government may refuse to carry out this contract, either with the transferor or transferee, but all rights of action for any breach of this contract by said Seller are reserved to the Government.

ARTICLE XI. No member of or delegate to Congress, or resident commissioner is or shall be admitted to any share or part of this contract or to any benefit that may arise therefrom. But this article shall not apply to this contract so far as it may be within the operation or exceptions of Section 116 of Act of Congress, approved March 4, 1909 (35 Stats. 1109).

ARTICLE XII. No person or persons shall be employed in the performance of this contract who are undergoing sentence of imprisonment at hard labor, which has been imposed by any court of any of the several States, Territories or municipalities having criminal jurisdiction.

ARTICLE XIII. Any notice or other communication to be given by the Government to the Seller under this agreement shall be given to the Seller at Astoria, Oregon, and any notice to be given under this agreement to the Government, shall be [104] addressed to the Officer in Charge of SPRUCE PROD. DIV. of the Signal Corps, War Department, 507-517 Yeon Building, Portland, Oregon.

ARTICLE XIV. This contract shall be subject to the approval of the Chief Signal Officer, United States Army.

IN WITNESS WHEREOF, the Seller has caused this contract to be executed by its proper officer duly authorized, and the Government has caused this contract to be executed by the undersigned Contracting Officer herein duly authorized.

Signed by Parties Named in the Contract  
and Signatures Witnessed.

Approved: Portland, Oregon, Dec. 28, 1917.

BRICE P. DISQUE,

Colonel, Signal Corps, U. S. A.

Approved: Mar. 27, 1918. By Authority of the Chief Signal Officer. (Authorization of July 11, 1917.)

A. C. DOWNEY,

Major, Signal Corps. [105]

STANDARD SPECIFICATIONS No. 1.  
THICKNESS.

2" to 6" inclusive, at least 60% to be 3" and 4" thick. Not more than 40% 2"-5" and 6" thick.

WIDTH.

All to be 4" and wider, not over 10% under 5" wide.

LENGTH.

50% to be 18' and longer; 50% to be 4' and longer.

MEASUREMENT.

Widths and thickness fractional inches—lengths in multiples of one foot.

GRAIN.

All lumber 3" and thicker shall not be less than 70% vertical grain of an angle of 45 degr. to 90 degr. on each carload.

All lumber 2" thick shall not be less than 30% vertical grain of an angle of 45 degr. to 90 degr. on each carload.

#### GRADES.

The 50% of all lumber 18' and longer shall be clear four sides, straight grained, not less than six annular growth rings for each one inch, sound and well manufactured, free from shakes, spiral and curly grain.

This grade will admit of bright sap, wane, pin worm holes, slight variations in sawing or other defects that will not impair its use for wing beams.

The 50% of all lumber 4' and longer shall yield clear cuttings, straight grained, not less than six annual growth rings per each one inch, sound and well manufactured, free from shakes, spiral and curly grain; same may contain knots, pitch pockets, wane, pin worm holes, slight variations in sawing and other defects that will not impair its use for the purpose intended, providing, however, that each piece must produce, for buyer, clear straight grain cuttings from 4' to 17' lengths, which shall not include over 5% of such cuttings 4' to 7' inclusive.

[106]

EXTRACT FROM MINUTES OF A REGULAR MEETING OF THE BOARD OF DIRECTORS OF THE OREGON PACIFIC MILL & LUMBER COMPANY held this eighteenth day of December, 1917, at 10:30 o'clock A. M., at the office of the Company, 135 Stockton Street, San Francisco, California.



There were present Directors F. Dohrmann, Jr., C. W. Corbaley and J. W. McDonald, Jr.; Absent: Directors F. K. Eckley and Jno. J. O'Toole.

"On motion duly seconded, it was unanimously

"RESOLVED: That the Vice-President and Manager of this Company, Mr. C. W. Corbaley, be and he hereby is authorized to execute a contract on behalf of this Company with the Spruce Production Division of the Signal Corps, United States Army for delivery to said Division of Spruce lumber in the approximate quantity of ten million (10,000,000) feet, as per copy of contract which is attached to and made a part of these Minutes."

I, I. Fuendeling, Assistant Secretary of the Oregon Pacific Mill & Lumber Company, hereby certify the above to be a full, true and correct extract from the Minutes of a meeting of the Board of Directors held this 18th day of December, 1917, at the office of the Company.

[Corporate Seal]

I. FUENDELING,  
Assistant Secretary. [107]

The witness next produced and identified Plaintiff's Exhibit 6, which, among many other things, assigns all spruce production contracts from the United States of America to the United States Spruce Production Corporation, and it is dated October 10, 1918.

The witness then testified that the claim of Rogers was presented to the Contract Board of the United States Spruce Production Corporation, which was a board appointed by the President of



the corporation for the purpose of hearing and determining claims which arose out of the operation of the Spruce Production Division and of the Spruce Production Corporation in connection with the Government's program for the production of airplane material in this district, and that this Contract Board on the 29th day of January, 1919, filed their findings, which the witness then produced and identified and they were introduced in evidence as Plaintiff's Exhibit 7, and are as follows:

**Plaintiff's Exhibit No. 7.**

WAR DEPARTMENT SPRUCE PRODUCTION DIVISION BUREAU AIRCRAFT PRODUCTION.

Yeon Building, Portland, Ore., Jan. 29, 1919.

FROM: The Contract Board. To Board of Trustees, U. S. Spruce Production Corporation, Portland, Oregon.

SUBJECT: Claim #44, Clement W. Rogers, Astoria, Oregon.

1. The Oregon-Pacific Mill & Lumber Company had contract SPD-4 with this Division, dated December 22, 1917, for 10,000,000' of airplane spruce lumber, deliveries to be made at the rate of 560,000' per month, commencing January 1918. This mill was operated by Charles W. Corbaley and advances in large sums of money which in the final analysis amounted to \$315,000.00 were made for this operation by Mr. Clement W. Rogers of San Francisco, California.

2. Through mismanagement on the part of Mr. Corbaley, this mill was finally taken over by Mr. Rogers and a new contract SPD-261 was entered into with Mr. Rogers doing business under the name of the Clatsop County Lumber Company. This contract dated October 8th was for 6,200,000' of spruce airplane lumber on which deliveries were to be made at the rate of 560,000' per month commencing with October 1918, it being part of one of the provisions of this contract that SPD-4 above mentioned was cancelled and superseded by this contract SPD-261. Contract SPD-261 although properly signed and approved has never been delivered to the officials of the Clatsop County Lumber Company.

3. Deliveries under these two contracts total approximately 3,700,000' of lumber prior to the cessation of all activities of this Division on November 12th, whereas if the terms of contract SPD-4 and SPD-261 had been lived up to there should have been delivered on November 12th 5,600,000' or a total of the ten months, agreed contract amount. This would leave an undelivered balance of 4,400,000'.

4. The original purchase price of this mill and timber [108] which timber included approximately 16,000,000' of spruce; 10,000,000' of fir and 16,000,000' of hemlock was \$278,000.00 and claimants further state that if there was expended \$60,000.00 for improvements which included barracks for soldier labor, sprinkler system and other necessary repairs to put the mill in operating condi-

tion. Claimant states that the total debits of his investment are \$385,584.42 and that the total credits are \$191,693.21, leaving a net loss of \$193,891.21, which sum is the amount asked in reimbursement of their claim. In the credit items of above amount is an amount of \$100,000.00 which is considered salvage value on the investment, and, of course, this figure is a debatable one, in view of market conditions for lumber and the attitude of investing capital as to whether or not the mill is a saleable proposition now or within the next six months.

5. The Board does not recognize the entire claim of Mr. Rogers because of the fact that his mill was operating at a loss while under the direction of Mr. Corbaley and the Board cannot consistently recommend consideration of repayment of losses sustained by reason of one individual permitting his affairs to be managed by another individual, when the second individual through his own negligence causes such losses. On the other hand, the Board recognizes the fact that there is still an open contract for the delivery of 4,400,000' of airplane spruce lumber without a cancellation clause attached and upon which claimant can rest his claim, especially in view of the fact that during the last couple of months the operation of this mill under the new manager, Mr. Brown, it is evident that the mill was producing lumber at a profit. There is a further consideration, that under instructions from Lieutenant Colonel Hitchcock, the Grant Smith-Porter Brothers Company [109]

acting as cost plus operators for this Division signed a selective logging contract with the claimant, which contract, claimant states, was signed as a result of a letter from Colonel Hitchcock under date of August 22, 1918, in which they were advised that if said contract was not signed it would be necessary to commandeer the timber. It is to be recorded here that, of course, claimants signed the contract in perfectly good faith, but it is also to be noted that the selective logging of a piece of property does not leave the timber in a position to be known as a good commercial logging "show" and for that reason it is questionable as to what value the timber has in relation to its connection with the mill when it comes to a proposition of salvaging this mill be sale. The credit item, therefore, of \$100,000.00 as figured in their statement of claim is a debatable one.

6. The Board in attempting to arrive at a basis of settlement which does not include the consideration of estimated profits, but which would seem fair and acceptable to the claimant as well as the Division, has made computation as follows:

Original investment .....	\$278,000.00
Improvements .....	60,000.00

---

\$338,000.00

(On account of the fact that the contract should have been 56% completed, there should have been

written off 56% of \$338,000.00, leaving a balance to be assumed as a portion of this claim.)

To be claimed ..... \$148,720.00

Less salvage value ..... 100,000.00

---

NET LOSS .... \$ 48,720.00

7. Mr. Rogers requests reimbursement in the sum of 193,891.21, but the Board offered him in settlement \$48,720.00. Mr. Rogers refused to accept this. The Board then reconsidered the matter and in view of the fact that the item of \$100,000.00 [110] salvage, as above stated, is questionable, the Board made a second offer to Mr. Rogers of \$60,000.00 which was accepted, as evidenced by the attached waiver properly signed.

8. The Board, therefore, recommends that the claimant, Clement W. Rogers be reimbursed in the sum of \$60,000.00 in full and final settlement of any and all claims growing out of the cancellation of Contracts SPD-4 and SPD-261, it being understood and agreed that this settlement covers all claims of Clement W. Rogers, the Oregon-Pacific Mill & Lumber Company and the Clatsop County Lumber Company.

THE CONTRACT BOARD.

(Sgd.) FRANK D. EAMAN.

FRANK D. EAMAN, Major, A. S. A. P.,  
President.

(Sgd.) E. G. GRIGGS,  
E. G. GRIGGS, Major A. S. A. P.,

(Sgd.) C. SQUIRES,  
C. SQUIRES, Captain, A. S. A. P.,  
Recorder.



Date 2/6/19.

Approved:

(Sgd.) BRICE B. DISQUE,  
BRICE B. DISQUE, Brigadier General,  
U. S. A. President, U. S. S. P. Corp'n.  
CS-DOB. [111]

CLAIM NO. 44.

ACCEPTANCE.

January 29, 1919.

I hereby agree to accept the sum of \$60,000.00 in full payment and satisfaction of any and all claims and demands we have or may have against the United States Spruce Production Corporation or Spruce Production Division, Bureau of Aircraft Production, U. S. Army, in any way growing out of our contracts SPD-4 and SPD-261, or as represented by our claim No. 44, heretofore filed with the Contract Board.

CLEM. W. ROGERS.

Witnesses:

C. SQUIRES,  
RAYMOND M. ALLEN. [112]

The witness next produced and identified and there was introduced in evidence Plaintiff's Exhibit No. 8, [54] which was a check from the United States Spruce Production Corporation to C. W. Rogers, Astoria, Oregon, for \$60,000.00 and counsel for defendant Rogers admitted that he received this money.

The witness next produced and identified and there was introduced in evidence Plaintiff's Exhibit No. 9, which is as follows:



**Plaintiff's Exhibit No. 9.**

“Claim No. 44.

**RELEASE.**

WHEREAS, C. W. Rogers, sole trader doing business under the name of Clatsop County Lumber Co. hereinafter referred to as the Contractor, heretofore entered into a contract with the United States of America, hereinafter referred to as the Government, for the sale and delivery to the Government of Spruce Lumber desired for airplane material, said contract being No. SPD.-261 superseding Contract No. SPD-4, and dated October 8, 1918, and which contract was later assigned by the Government to the United States Spruce Production Corporation; and

WHEREAS, owing to the cessation of hostilities in the war between the United States and its Allies and the Imperial Government of Germany, the Government has discontinued its purchase of airplane material and it has been found necessary to cancel said contract; and

WHEREAS, the Contractor claims certain damages by reason of such cancellation and has filed claim therefor with the Contract Board appointed for the purpose of considering and adjusting such claims, under General Orders No. 34, dated November 22, 1918, issued by the Commanding General of the Spruce Production Division, Bureau of Aircraft Production of the United States Army; and [55]

WHEREAS, said Contract Board has allowed said claim in the sum of Sixty Thousand (\$60,000.00) Dollars, and the contractor has agreed to accept said award in full settlement and satisfaction of all claims or rights against either the Government or said United States Spruce Production Corporation, arising out of said Contract.

NOW, THEREFORE, THIS INSTRUMENT WITNESSETH: That, in consideration of the sum of Sixty Thousand (\$60,000.00) Dollars paid to said Contractor by the United States Spruce Production Corporation, the receipt of which sum is hereby acknowledged, said Contractor hereby acknowledges full satisfaction of all claims and demands against the United States of America and said United States Spruce Production Corporation or either of them growing out of or based on the above-mentioned Contract No. SPD.-261 and No. SPD.-4, or otherwise, and hereby releases the United States and the said United States Spruce Production Corporation from all liability, claim or demand whatsoever which said Contractor may have or claim to have, whether now existing or hereinafter arising, growing out of the aforesaid contract or its cancellation or in any manner based thereon, as well as all claims or demands of every kind and character whatsoever arising out of or in connection with any operations of the contractor or dealings of any kind had between the contractor and the Government or the United States Spruce Production Corporation, or either of them, and its on their officers, agents or representatives.

IN WITNESS WHEREOF, said contractor has executed this release this 20th day of February, 1919.

C. W. ROGERS.

C. W. ROGERS, Sole Trader Doing Business  
as Clatsop County Lumber Co.

Signed in the presence of

C. M. RIDER.

WM. J. GIBSON.

Approved: Major, A. S. A. P., U. S. A., Mgr.  
Legal Department." [56]

The witness next produced and identified and there was offered in evidence Plaintiff's Exhibit No. 10, which is as follows: [57]

**Plaintiff's Exhibit No. 10.**

SIGNAL CORPS, UNITED STATES ARMY.

10/3/18

Contract No. SPD-261.

(b)

CONTRACT FOR SPRUCE AIRPLANE  
LUMBER.

THESE ARTICLES OF AGREEMENT, entered into this 8th day of October, 1918, by and between Clement W. Rogers, a sole trader, doing business at Astoria, Oregon, under the name of Clatsop County Lumber Company, party of the first part, hereinafter called the "Seller," and the United States of America, hereinafter called the "Government," represented by Prescott W. Cookingham, Captain, A. S. A. P., United States

Army, hereinafter referred to as the "Contracting Officer," acting by the authority of the Chief Signal Officer of the United States Army, and under the direction of the Secretary of War, party of the second part, WITNESSETH:

WHEREAS, Congress having declared by joint resolution, approved April 6, 1917, that war exists between the United States of America and the Imperial German Government, constituting a national emergency;

Now, therefore, under the provisions of Section 120 of an Act of Congress relating to national defense, approved June 3, 1916, and pursuant to all other laws of the United States and executive orders of the President of the United States, or heads of its departments, under which requirements for advertisements for proposals are dispensed with and contracts in the form hereof are duly authorized, the President hereby places the following order with the Seller with the requirement that it comply with the contract hereinafter set forth, and in consideration of the mutual agreements herein contained, said parties have agreed and by these presents do agree to and with each other as follows, viz:

ARTICLE I. The Seller hereby agrees to sell to the Government, [113] and the Government hereby agrees to purchase from the Seller, in accordance with the terms and conditions hereinafter set forth six million two hundred thousand board feet of spruce airplane lumber within the period ending June 30, 1919, which shall con-

form in all respects to the requirements and provisions of the specifications hereto attached, or such modification thereof as the Government shall hereafter from time to time adopt.

ARTICLE II. The Seller agrees to deliver not less than five hundred sixty thousand (560,000) board feet of said lumber during each month, commencing with the month of October, 1918, and continuing until the expiration of this contract. Time is of the essence of this agreement, and in the event that for any reason deliveries in any months shall be less than the amount last above specified, the Government may elect not to accept any deficiency, but if such election be not made in writing, delivered to the Seller within ten (10) days after the end of the month in which any such deficiency occurs, the deficient amount shall be delivered in the next succeeding month following that in which the deficiency occurred or as soon thereafter as possible. The deficiencies, however, will not be accepted by the Government after the expiration of the period covered by this agreement. The Seller shall not be held liable for delays in deliveries caused by strikes, fires, floods, riots, acts of God or the public enemy, or any other cause beyond the control or without the fault of the Seller, provided that nothing herein contained shall impair the Government's right herein given to refuse to accept any deficiency in deliveries in any month.

ARTICLE III. Deliveries of said lumber shall be made by the [114] Seller to the Government



free on board cars at Astoria, Oregon, but if the Government shall notify the Seller within a reasonable time in advance of its intention to ship any part of said lumber by water, and the Seller's mill be adjacent to water, the delivery of that part of said lumber shall be free alongside ship at mill of production, but any lighterage charge or any expense or rehandling after delivery as above specified shall be paid by the Government.

The said lumber shall be loaded in the manner provided in the specifications attached hereto or in the absence of any provisions in the specifications, it shall be loaded to the satisfaction of the carrier receiving the same.

ARTICLE IV. Before loading, all said lumber to be delivered under this contract shall be inspected at the time of delivery as to compliance with the specifications hereto attached, or such modification thereof as the Government shall adopt, and as to measurement at Astoria, Oregon, by inspectors authorized by the Government, which inspection and measurement shall be final. The Government hereby reserves the right to refuse, and to mark the letters "C. S." in crayon on any lumber found on such inspection not to be in compliance with the specifications hereto attached, or such modification thereof as the Government shall adopt. The Seller shall provide such grading in advance of inspection by inspectors authorized by the Government as will facilitate said inspection.

ARTICLE V. The price to be paid for such lumber to the Seller by the Government shall be One Hundred Seventy-five (\$175.00) Dollars per thousand for Wing Beam Stock (Grade "A"); Eighty (\$80.00) Dollars per thousand for Long Clears (Grade "B"); and Forty-five (\$45.00) Dollars per thousand for Short and Thin [115] Clears (Grade "C") all per one thousand (1000) board feet, based on measurements noted in specifications hereto attached, or such modification as the Government shall adopt.

ARTICLE VI. Payments shall be made for said lumber so delivered within a reasonable time after the presentation to the Officer in Charge of Disbursements, Spruce Production Division, of the Signal Corps, Yeon Building, Portland, Oregon, or his duly authorized representative, hereinafter called the "Disbursing Officer," of Seller's invoice, including piece tally manifests, documents showing delivery free on board cars or free alongside ship at mill of production, and certificate of inspection executed by inspectors authorized by the Government, certifying to the measurement of the lumber so delivered and its compliance with specifications hereto attached, or such modification as the Government shall adopt, and upon a voucher wherein the said Disbursing Officer shall certify the amounts to be so paid, and that the same have been determined by him to be due and payable to the Seller in accordance with the provisions of this contract.



ARTICLE VII. The Government hereby reserves the right at any time during the period covered by this contract to change, alter and amend the specifications attached to this agreement in such particulars as it may deem advisable, provided, however, that if any change or changes in grade or specifications hereto attached are made by the Government, it is agreed that a corresponding change shall be made in the price. The Seller agrees that it will comply with all the terms of such specification as changed, altered or amended by the Government.

ARTICLE VIII. It is further understood and agreed that in view of the emergency now to be met, the Seller will produce [116] and operate hereunder to the fullest capacity possible under the circumstances, and that he will during the period covered by this contract, buy at prices set and determined by the Government, sufficient stumpage, logs and other materials to enable the Seller to comply with his obligations hereunder, without discrimination on account of the individual or other cause, the quantity and quality to be determined by the grading rules established by the Government.

ARTICLE IX. It is further contracted and agreed that the Seller shall saw, manufacture and deliver the lumber herein contracted to be delivered in a good and workmanlike manner and to the satisfaction of the Government. And if at any time the Government should determine that the Seller is not complying with this clause of the

contract, the Government may at once terminate this contract and decline to receive any more deliveries from the Seller.

ARTICLE X. Neither this contract nor any interest therein shall be transferred or assigned by the Seller to any person, firm or corporation, without the written consent of the Government, and in case of such transfer, without its written consent, the Government may refuse to carry out this contract, either with the transferor or transferee, but all rights of action for any breach of this contract by said Seller are reserved to the Government.

ARTICLE XI. No member of or delegate to Congress, or resident commissioner, is or shall be admitted to any share or part of this contract or to any benefit that may arise therefrom. But this article shall not apply to this contract so far as it may be within the operation or exceptions of Section 116 of Act of Congress, approved March 4, 1909 (35 Stats. 1109).

ARTICLE XII. No person or persons shall be employed in the performance of this contract who are undergoing sentence of imprisonment at hard labor, which has been imposed by any [117] court of any of the several States, Territories or municipalities having criminal jurisdiction.

ARTICLE XIII. Any notice or other communication to be given by the Government to the Seller under this agreement shall be given to the Seller at Astoria, Oregon, and any notice to be given under this agreement to the Government, shall

be addressed to the Officer in Charge of Contracts of the Spruce Production Division, Bureau of Aircraft Production, Yeon Building, Portland, Oregon.

ARTICLE XIV. This contract shall be subject to the approval of the Director of Aircraft Production.

ARTICLE XV. The Government may assign this contract to the United States Spruce Production Corporation or to such other concern as may be mutually agreed upon, and the assumption by such Corporation or concern of the Government's obligations under this Contract shall relieve the Government of any responsibility or liability hereunder.

ARTICLE XVI. Whereas, the Oregon Pacific Mill & Lumber Company has a contract, No. SPD-4, dated December 17, 1917, to furnish spruce airplane lumber to the Government, and

WHEREAS, the Clatsop County Lumber Company has succeeded to all the rights, obligations and property of the said Oregon Pacific Mill & Lumber Company, and the above mentioned Clement W. Rogers has been given authority by the resolution of the Oregon Pacific Mill & Lumber Company hereto attached to cancel said contract,

It is agreed that said contract, dated December 17, 1917, shall be and is hereby cancelled as of September 30, 1918.

O. K.—C. W. R.

IN WITNESS WHEREOF, the Seller has caused this contract [118] to be executed by

its proper officer duly authorized, and the Government has caused this contract to be executed by the Undersigned Contracting Officer herein duly authorized.

Exhibit Signed by Parties Named in Body  
of This Instrument.

Witnesses:

Approved: Oct. 11, 1918.

G. E. BREECE,

Major, A. S. A. P. Approvals Officer.

Approved: Oct. 14, 1918.

R. S. ESKRIDGE,

Major, A. S. A. P.

Approved: Oct. 17, 1918.

By Authority of Director Aircraft Production.

BRICE P. DISQUE,

Brigadier General, U. S. Army, Commanding  
Spruce Production Division. [119]

**Testimony of Clem W. Rogers, in His Own Behalf.**

Mr. CLEM W. ROGERS, the defendant, testified in substance as follows:

He was a resident of San Francisco and was the financial representative of Mr. C. S. Howard, a wealthy man of San Francisco. In the latter part of 1917 C. W. Corbaley had secured an option to purchase the sawmill and timber of the Clatsop Mill Company at Astoria, Oregon, and had secured a contract (it was really a tentative arrangement) from the United States Government to manufacture airplane spruce. With Mr. Corbaley were associated J. W. McDonald and Mr. Dohrmann, a

(Testimony of Clem W. Rogers.)

San Francisco capitalist, and these gentlemen formed the Oregon Pacific Mill & Lumber Company, a Nevada corporation, for the purpose of taking over the said properties on which Corbaley had secured an option and making a contract, following the tentative arrangements which Corbaley made with the Government to manufacture airplane spruce. Their plan was to secure advances of money from the United States Government on their contract with which they intended to pay for the sawmill and timber and finance their operations. The government would not advance them money unless they put up a satisfactory surety bond, and this necessitated indemnifying a surety company before it would put up the required bond. About the 20th of December, 1917, Mr. Rogers, as Howard's financial agent, was approached to see whether he would furnish the required indemnity, with the result that Mr. Howard deposited with the surety company, \$300,000.00 in bonds to secure it against liability on the bond. To define the rights of the parties in this transaction the following indenture, Defendant's Exhibit "A," was executed:

**Defendant's Exhibit "A."**

**"THIS INDENTURE**

Made and entered into this 8th day of January, 1918, by and between [58] Clem W. Rogers, of the City and County of San Francisco, State of California, Party of the First Part, and Oregon Pacific Mill & Lumber Company (a Nevada Cor-



poration) and F. Dohrman, Jr., C. W. Corbaley, J. W. McDonald, Jr., F. K. Eckley and John J. O'Toole, of the City and County of San Francisco, State of California, both as Directors and sole stockholders of the said corporation, Parties of the Second Part:

#### WHEREAS

The said Party of the First Part has loaned or is about to loan to the said Corporation Party of the Second Part, and for its use and benefit, securities of the agreed value of at least the sum of Three Hundred Thousand Dollars (\$300,000.00), at the special instance and request of the said Parties of the Second Part; and

#### WHEREAS

The said Parties of the Second Part have and each of them has requested of the said Party of the First Part that he do and perform each and all of the things and acts hereinafter referred to on his part to be performed; and

#### WHEREAS

The said Corporation Party of the Second Part is the owner of a certain agreement of purchase of a portion of the property of the Clatsop Mill Company, a Corporation, which said agreement is dated December 3, 1917, and is by this reference incorporated in and made a part of this INDENTURE: and

#### WHEREAS

The said Party of the First Part has rendered and is now rendering to the said Party of the



Second Part certain services of a very valuable nature:

NOW THEREFORE THIS INDENTURE WITNESSES: That [59] for and in consideration of the premises and in further consideration of the true and faithful performance of all the terms and conditions of this INDENTURE, the said Parties of the Second Part do, and each of them does, by these presents, grant, bargain, sell, convey, confirm, transfer, assign, set over and deliver to the said Party of the First Part, all of their and each of their, right, title, estate and interest of every kind and character in and to all and every part of the property of the said Corporation Party of the Second Part, real, personal and mixed, which it may now own or hereafter acquire, including any and all options, contracts, rights, leases, titles and interest of every kind and character and in particular all contracts with the Government of the United States, and all interests arising under such contracts; and it is distinctly understood and agreed

1. That said Party of the First Part is hereby appointed the GENERAL MANAGER and TREASURER of this Corporation, Party of the Second Part, for the term of this INDENTURE, with full power and authority to exercise, without any resolution or further authorization of the said Parties of the Second Part or any of them, each and all the powers and rights of the said Corporation Party of the Second Part, to the same extent that the said powers and rights could be exercised

by the said Corporation, its Directors, Members or Stockholders or Officers or Attorneys, which said exercise of powers the said Parties of the Second Part do and each of them does hereby ratify, adopt, approve and confirm, as their and each of their respective acts; and it is further distinctly understood and agreed that during the term of this INDENTURE, neither the Directors nor the Officers nor Stockholders of the said Corporation shall exercise, or attempt to exercise [60] any right or power inconsistent with the provisions of this INDENTURE; provided, however, and the said Party of the First Part hereby covenants that he will not interfere with the practical management or operation of the said mill so long (1) as all the payments herein provided for are made at the time and in the manner specified and all the other terms of this contract kept and performed and so long also (2) as the said mill is conducted in the ordinary course of such industries, to wit: buying logs, manufacturing the same into lumber and lumber products and selling the same, all at prices which are satisfactory to the said party of the First Part; it being the object, purpose and intent of this proviso that no additional investments or improvements of any character, such as enlarging the plant, purchase of other plants and of interests therein, constructing railways, purchase of timber lands, or the purchase of any interests in any such investments, improvements, and matters, shall be made either by contract or otherwise by the said Corporation or by its

officers or agents or any of them, or by the said Parties of the Second Part.

2. The salary of the said Party of the First Part as such said General Manager and Treasurer, shall be the sum of Two Hundred and Fifty Dollars (\$250.00) per month, payable monthly.

3. The said Party of the First Part shall be repaid and reimbursed any and all sums of money or property advanced by him at the rate of Twenty Thousand Dollars (\$20,000.00) per month, payable monthly, on the 8th day of each and every consecutive month commencing with the 8th day of April, 1918, until the same is repaid, and also interest at the rate of eight per cent (8%) per annum on all sums actually advanced by [61] him, also payable monthly; provided however, that the said Parties of the Second Part shall have the right and option at any time after January 8, 1918, to repay all of said sums and interest, and the said Part of the First Part hereby covenants that in the event of such repayments being made, including the profits hereinafter referred to, and the said Parties of the Second Part giving to him security which shall be satisfactory to him for the true and faithful performance of all the other terms and conditions of this contract, he will resign as the General Manager and Treasurer of the said Corporation Party of the Second Part.

4. In addition to all other payments to said Party of the First Part, he shall be paid in cash monthly, a further sum equal to twenty per cent (20%) of the net profits of the Corporation Party.

of the Second Part, from all sources, as the same accrues and are earned during a period of Eighteen Months (18) from date hereof.

5. The said profits are to be determined after allowing for depreciation at a rate not in excess of Ten Thousand Dollars (\$10,000.00) per annum on all property, and stumpage at the rate of Five Dollars (\$5.00) per thousand.

6. When all the said payments are made and each and all the things done by the said parties of the Second Part on their part to be done and performed and in the manner herein provided for, the said Party of the First Part shall reconvey to the said Parties of the Second Part all the said property hereby conveyed to him, less the said payments hereinbefore referred to, on the said Parties of the Second Part executing to the said Party of the First Part a general release of all liability.  
[62]

7. The said Parties of the Second Part shall pass or cause to be passed all necessary resolutions of the said Board of Directors and Stockholders, Amendments to the By-Laws or Articles of Incorporation of the said Corporation Party of the Second Part to give all the provisions of this Indenture full force and effect; and in addition thereto shall pledge and cause to be pledged to the said Party of the First Part at least Twelve Hundred and Fifty Shares (1250) of the capital stock of the said Corporation Party of the Second Part, and it is distinctly understood and agreed in this respect that the said Parties of the Second

Part shall not issue, or cause or allow to be issued more than One Thousand (1000) additional such said shares without the written consent of the said Party of the First Part.

8. At the end of the period herein provided for, the said Parties of the Second Part shall make execute and deliver to the said Party of the First Part, a general release of all liability, on his rendering true and proper accounts and reports in accordance with the provisions of this agreement.

AND IT IS FURTHER HEREBY MUTUALLY UNDERSTOOD AND AGREED that time is hereby expressly declared to be of the essence of this contract; that the said Parties of the Second Part shall pay or cause to be paid into the treasury of the said Corporation Party of the Second Part, for and on account of its working capital, to be used as such, the sum of One Hundred Thousand Dollars (\$100,000.00) in cash as the same is needed but in any event not later than March 5, 1918; that any failure to pay this total sum in the manner specified shall be construed to be and understood and agreed to be a default; [63] that on any default of any nature on the part of said Parties of the Second Part or any of them, the said Party of the First Part shall at his option be relieved at law and in equity of all duty or liability to reconvey or to account, and shall be entitled to own, hold and transfer the said property as his own, free and clear of any claim or right or demand of any nature on the part of the said Parties of the Second Part or any of them; and that the provi-



sions of this Indenture shall be binding upon and its benefits accrue to the successors and assigns of the parties hereto.

MADE, EXECUTED AND DELIVERED IN DUPLICATE this 8th day of January, 1918, by the parties hereto, the said Corporation acting through its officers thereunto duly authorized.

[Seal]

Parties of the First Part:

OREGON PACIFIC MILL AND LUMBER  
COMPANY, a Corporation.

By F. DOHRMANN, Jr.,

President.

By JNO. W. McDONALD, Jr.,

Secretary.

Parties of the Second Part:

F. DOHRMANN, Jr.,

JNO. W. McDONALD, Jr.,

CHAS. W. CORBALEY,

JNO. J. O'TOOLE,

Directors of said Corporation Party of the Second  
Part.

F. DOHRMANN, Jr.,

JNO. W. McDONALD, Jr.,

CHAS. W. CORBALEY,

F. K. ECKLEY,

JNO. J. O'TOOLE,

Stockholders of the Said Corporation Party of the  
Second Part." [64]

It appearing some time in February, 1918, that the government intended to charge the Oregon Pacific Mill & Lumber Company 8% on all advances



made by the Government, Mr. Rogers agreed that he would enable the Oregon Pacific Mill & Lumber Company to dispense with the governmental loans by himself making the necessary advances to finance their operations. This arrangement did away with the necessity for any surety bond, and consequently the bond that had been given was cancelled and the \$300,000.00 in securities which Mr. Rogers for Mr. Howard had put up as indemnity was returned to Mr. Howard. The Government was paid back from moneys furnished by Mr. Rogers the money it advanced amounting to \$283,500.00, and thereafter Mr. Rogers instead of the government financed the lumber company.

To further protect Rogers in making these advances of securities and later of money, the deed and bill of sale from the Clatsop Mill Company conveying its timber lands and mill and equipment at Astoria were taken in the name of Rogers instead of the Oregon Pacific Mill & Lumber Company, and were placed in escrow in a bank in Portland. These are Defendant's Exhibits "D" (the deed) and "G" (the bill of sale) and are dated November 22, 1917. The consideration recited in the deed is \$300,000.00, and in the bill of sale \$1.00; but the actual consideration paid was \$266,587.90 for both the deed and the bill of sale. The idea was that if the Oregon Pacific Mill and Lumber Company performed its contract with Rogers, already set forth (Defendant's Exhibit "A"), Rogers would convey these properties to the Oregon Pacific Mill & Lumber Company; if not, then, having the deed

and bill of sale in his name would facilitate Rogers' enforcing his forfeiture rights under the contract. These instruments were placed in escrow pending completion of [65] payment of the purchase price, which was being paid in installments.

The men actively in charge of the operations of Oregon Pacific Mill & Lumber Company were Corbaley, Vice-President, and McDonald, Secretary. They were both at Astoria. Dohrmann was President. Rogers was Treasurer in order to protect his advances. These two were in San Francisco.

From the start operations were unsatisfactory. The Oregon Pacific Mill & Lumber Company failed to give Rogers an accounting at the end of the first month and, as they were asking for more money, Rogers on April 7th came up from San Francisco to investigate. As a result, he asked to have the books kept in his office at San Francisco and to have the vouchers sent him so that a statement could be made up showing whether the Oregon Pacific Mill & Lumber Company was making or losing money, and what its operations were. On this visit the government officers of the Spruce Production Divisions told him that the mill was not being run properly.

The Oregon-Pacific Mill & Lumber Company had defaulted in their first payment of \$20,000.00 to Rogers called for in the contract of January 8, 1918 (Defendant's Exhibit "A"), and Rogers extended the time for payment to June 1st on the understanding that if payments were not made and

conditions were not satisfactory he would cancel the contract.

When June came the company could not make its payments, and about the end of June or beginning of July, Dohrmann and Rogers came up together from San Francisco to Portland. The Oregon-Pacific Mill & Lumber Company under Corbaley and McDonald was not getting along. The Government had put in the eight-hour day and revised the rate of pay in the lumber camps and mills without making compensatory raises in the price of spruce. As a result of this July visit of Dohrmann's and Rogers', the contract of January 8, 1918 (Defendant's Exhibit "A") was modified by Rogers being given 51% of the stock in [66] the company so that he could the better take any action to protect his interests should default occur in the monthly payments to him of \$20,000.00, and he waived his right to 20% of the profits.

The stockholders of the Oregon Pacific Mill & Lumber Company never paid in the \$100,000.00 working capital insisted on by Rogers in the contract of January 8, 1918, as one of the essential conditions of his advances. Dohrmann furnished about \$40,000.00. All the rest of the money came from Rogers, and by August he had advanced \$345,000.00.

After the June-July visit of Rogers and Dohrmann, Corbaley and McDonald remained in charge and conditions got steadily worse. The Oregon Pacific Mill & Lumber Company never made any

payments for May, June, July or any further payments, and Rogers gave Dohrmann and the other stockholders until September 1st to pay up the \$100,000.00 working capital and find some means of reimbursing him. On September 1st nothing had been done toward this, and Rogers occasionally took possession of the property under his contract, and near the end of September or about the first of October, changed the name of the business and operated under his own name as a sole trader.

The minutes of a directors' meeting of the Oregon Pacific Mill & Lumber Company held September 24th (Defendant's Exhibit "E"), relating to this taking over of the property by Rogers, are as follows:

**Defendant's Exhibit "E."**

**"DIRECTORS' MEETING No. 9.**

**OREGON PACIFIC MILL & LUMBER  
COMPANY.**

Held on Tuesday, September 24, 1918, at the hour of two P. M., at the office of the Company.

Present: F. Dohrmann, Jr., Clem W. Rogers, E. M. Rider. [67]

Absent: Chas. W. Corbaley, J. W. McDonald, Jr.  
Mr. F. Dohrmann Jr., President, presided.

The Secretary read the minutes of the previous meeting, held on June 3, 1918, which on motion duly seconded were approved.

The President stated that the object of this



meeting was to take official note of the following facts:

That at the end of the month of August, 1918, the contract executed between this Company and Clem W. Rogers, which said contract is spread on the Minutes of the Directors Meeting of this Company of December 8, 1917, has not been fully complied with in so far as the time or repayments of money advanced is conditional therein; and further

That, based thereupon said Clem W. Rogers had on or about the first day of September, 1918, visited the property of the mill in Astoria, Oregon, and had, at that time, by express consent of Messrs McDonald, Corbaley and Dohrmann taken full possession of the properties in accordance with the said contract under the forfeiture clause therein; and further

That, the said property now stands on the records and deeds of Clatsop County, Oregon, in the name of Clem W. Rogers, Grantee; and further

That, the results of the operations of the business up to the first of September, 1918, have been absolutely unsatisfactory to all concerned; and further

That Messrs. Corbaley and McDonald had agreed that if the results by September 1, 1918, were not satisfactory to said Clem W. Rogers, it would be the only solution to have said Clem W. Rogers take full possession of the Mill as of September 1, 1918, and operate same for his own account as specified in said [68] contract as above; and further

That, said Messrs. McDonald and Corbaley had expressed their willingness to tender their resignations if the results by September 1, 1918 continued to prove unsatisfactory to said Clem W. Rogers; and further

That Messrs. McDonald and Corbaley had tendered to the Company their resignations, said resignations being attached to and made part of these Minutes.

Thereupon, on motion of Mr. Rogers, seconded by Mr. Rider, it was unanimously

RESOLVED, That all of the foregoing actions of the giving over possession of the properties at the mill to said Clem W. Rogers be approved; that he take and hold possession of the Mill and its properties and operate the same for and on his own behalf in protection of his interests, in accordance to the contract heretofore referred to; and that the said resignations of said Messrs McDonald and Corbaley be accepted by this Board as of September 30, 1918, it having been arranged that they ceased activities as Managers on or before September 1, 1918, and that the salary for the month of September 1918, be paid to Mr. McDonald, and that the salary for the month of September, 1918, for Mr. Corbaley be credited to his own personal overdraft account as heretofore arranged between him and said Clem W. Rogers.

On motion of Mr. Rogers, seconded by Mr. Rider, it was unanimously

RESOLVED: That all of the above actions be reported at the Special Meeting of the Stock-



holders, which the President was instructed to call, to be held October 8, 1918, at the office of the Company, for the approval and ratification [69] of the Stockholders of record.

The question was considered as to the advisability of electing successors to Mr. Corbaley and Mr. McDonald, and after discussion it was decided that no immediate action is necessary and said action was further postponed in view of the fact that there still remains a quorum of the Board of Directors in the persons of Mr. Dohrmann, Mr. Rogers and Mr. Rider.

In conjunction with the taking over of the premises and properties of the mill by Mr. Rogers, on motion of Mr. Rider seconded by Mr. Rogers, and duly carried, the President was authorized to negotiate with Mr. Rogers for the sale of all the cut lumber and logs in and belonging to the Mill as of September 30, 1918, at a fair price to be established and based on an inventory as of that date, the payment therefor to be credited to the Company on its indebtedness account to said Clem W. Rogers. The President then stated that he had already negotiated with Mr. Rogers in this matter and that they had agreed, subject to the above-mentioned action of this Board, that Mr. Rogers is to buy all the cut lumber as per inventory of September 30, 1918, at a price of \$20.00 per thousand feet flat less \$2.50 in consideration of the cost of handling, and to buy all the logs in the pond at the current Government established prices, namely \$35.00 for No. 1, \$20.00 for No. 2

and \$11.00 for No. 3, plus the proportion of cost to towage of same into the pond. Both the President and Mr. Rogers expressed themselves as satisfied with these prices, and on motion of Mr. Rider seconded by Mr. Rogers, the prices and these arrangements were duly confirmed by this motion being unanimously carried.

There being no further business, the meeting on [70] motion duly seconded adjourned.

F. DOHRMANN, Jr.,

President.

CLEM W. ROGERS,

Secretary.

Approved by:

F. DOHRMANN, Jr.,

CLEM W. ROGERS,

E. M. RIDER,

Directors.

Absent: resigned,

CHAS. W. CORBALEY,

JNO. W. McDONALD, Jr."

This action by the directors was approved by the Stockholders at a meeting held October 8th at which the stock was represented as follows:

F. Dohrmann, Jr..... 276 shares

E. M. Rider..... 2 shares

Clem W. Rogers..... 924 shares

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Total .....1202 shares

Absent ..... 308 shares

---

Total stock subscribed.....1510 shares

At this same stockholders' meeting the following resolution was adopted:

"Whereas, this company entered into a contract with the Government of the United States to furnish to it spruce airplane lumber, said contract being No. SPD-4 dated December 17, 1917; and

"Whereas, the company is unable to perform said contract and desires to secure the cancellation thereof, therefore [71] it is this day

RESOLVED, that Clement W. Rogers be and he is hereby authorized to cancel the said contract, such cancellation to be as of September 30, 1918."

It was further resolved at this meeting that the Oregon Pacific Mill & Lumber Company execute and deliver a deed to Rogers of the timber lands and a bill of sale of the mill and equipment, and this was done (Defendant's Exhibits "H" and "I"). The property thus conveyed to Rogers was the same as that which had been bought from the Clatsop Mill Company (deeds to which had been taken in Rogers' name) except some equipment and other property that had been sold or used up. The consideration paid by Rogers to the Oregon Pacific Mill & Lumber Company was \$246,312.15, and this was credited by him on the indebtedness of the Oregon Pacific Mill & Lumber Company to him. The Oregon Pacific Mill & Lumber Company was allowed exactly the same price which it had paid the Clatsop Mill Company for the property (\$266,587.90), less deductions for

property used up or sold off, insurance used up, depreciation, taxes and such like adjustments. These deductions left a balance of \$246,312.15 which Rogers therefore credited as aforesaid. When Rogers took over the mill he thought there would certainly be enough assets to pay all current liabilities. He was not sure about there being assets to pay himself and Dohrmann. Referring to the resolution authorizing Rogers to secure a cancellation of the company's contract with the Government (Contract SPD-4), Dohrmann was very anxious to have this cancelled, because he wanted to rid himself of any further liability for not having complied with the Government's terms. He was very anxious to have done with the whole thing. [72]

Contract SPD-4 having been cancelled and Rogers having taken possession and title to the mill and timber under his contract, and having commenced operations in his own name as sole trader, made a new contract with the Spruce Production Division for getting out spruce for the Government. This contract was SPD-261.

Rogers did not take over the entire business of the Oregon Pacific Mill & Lumber Company. He took possession and title to the mill, equipment and timber lands, as explained; he also took over the logs and lumber and allowed the Oregon Pacific Mill & Lumber Company therefor \$59,834.95. He took these logs and lumber not because he particularly wanted them, but because the lumber being already piled in the yard, he and the others

thought it would be more convenient for him to take it over to avoid getting it mixed with the lumber which he expected to produce under his new operations; he did not take over the cash, book accounts, bills receivable, or business of the Oregon Pacific Mill & Lumber Company. This amounted in round numbers to \$91,000.00. He did, however, as Secretary and Treasurer of that company liquidate the affairs of that company in so far as its assets would pay off its liabilities. These assets, however, were not sufficient to pay off all creditors in full. Besides the amount owing Brix Brothers, to recover which this suit is brought, the Oregon Pacific Mill & Lumber still owes Dohrmann \$8,262.61 and Rogers over \$31,000.00 (unless the \$60,000.00 which Rogers got from the Spruce Production Division belongs to the Oregon Pacific Mill & Lumber Company). Dohrmann has never made any claim that Rogers should reimburse him this \$8,262.61. There are, apparently, still other claims as yet unpaid. [73]

Referring to the claim which Rogers presented to the Spruce Production Division for damages, the witness said that at the first meeting he had with the Claims Board of the Spruce Production Division the Board denied any liability to the Oregon Pacific Mill & Lumber Company, giving as reason for such denial that the Oregon Pacific Mill & Lumber Company had cancelled its contract of its own free will and consequently had no claim against the government at all. The Claims Board persisted in this attitude throughout, and



never did acknowledge any liability to the Oregon Pacific Mill & Lumber Company on Contract SPD-4. The reason he presented his claim both in his own name and as assignee of the Oregon Pacific Mill & Lumber Company was that Mr. McDonald asked him to file a claim for the Oregon Pacific Mill & Lumber Company at the same time that he filed his own claim, and he told McDonald that he didn't think the Government would consider any such claim but that he would be willing to do it, and McDonald prepared the figures, such figures as he had down in San Francisco, showing their losses, and asked Rogers to present it and Rogers took it to an attorney in Portland. First when he came to Portland he went to see the Board of Claims to ask them how they wanted the claim prepared. He told them he had a claim for the Oregon Pacific Mill & Lumber Company and one for himself. They said, "Well, put all your claim together, whatever it is; let's know all about it at one time. There is no regular form. You can just make up the claim and present it." So he gave the facts to an attorney in Portland and that is the way the claim was made up. [74]

### **Testimony of C. L. Brown, for Defendant.**

C. L. BROWN testified that he was a resident of San Francisco and was in the employ of defendant Rogers the latter part of the year 1918 as manager of the mill at Astoria after Rogers took it over October 1, 1918, and that he assisted in the preparation and presentation of Rogers' claim



to the Spruce Production Claims Board and took part in the negotiations with the Board, and that the Board referring to Contract SPD-4, told him and Rogers that the Board would not consider a claim on a contract which had been previously cancelled at the request of the Oregon Pacific.

### **Order Approving Statement of Evidence.**

Due notice of the lodging in the Clerk's office of the foregoing statement having been given to counsel for appellee and counsel having made no objection, said statement is hereby approved as true, complete and properly prepared, the exhibits noted in the foregoing statement as to be set out in full printed record being deemed a part of the foregoing statement the same as if they were set out in full therein.

R. S. BEAN,  
Judge.

Dated this 25th day of July, 1922. [75]

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AND AFTERWARDS, to wit, on the 13th day of July, 1922, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [120]

### **Praecipe for Transcript of Record.**

To G. H. Marsh, Esquire, Clerk of the Above-entitled Court:

Sir:

We desire the following portions of the record and the statement of the proceedings at the trial

and of the evidence submitted herewith to be incorporated into the transcript on appeal.

1. A notation of some sort that the case was removed from the Circuit Court of the State of Oregon for Clatsop County.

2. The complaint, omitting the verification.

3. The first amended answer, omitting the verification.

4. Statement of proceedings at the trial and of the evidence herewith submitted.

5. Memorandum opinion of Judge Bean dated December 12th.

6. Decree.

7. Petition for rehearing.

8. Order denying petition (if there was one; I cannot find it in the record).

9. Notice of appeal, bond, assignments of error, and other papers showing perfection of appeal.

ERSKINE WOOD,

Of Attorneys for Defendant, Appellant.

Service accepted July 13, 1922.

CAREY & KERR,

OMAR C. SPENCER,

Solicitor for Plaintiff's Appellee. [121]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do

hereby certify that the foregoing pages numbered from three (3) to one hundred and twenty-one (121), inclusive, constitute the transcript of record upon appeal from the decree of the said District Court of the United States for the District of Oregon, in the case in said Court wherein Brix Bros. Logging Co., a Corporation, is plaintiff and appellee, and Clem W. Rogers is Defendant and appellant; that said transcript of record has been prepared by me in accordance with the praecipe for transcript filed in said cause, and that the said transcript is a full, true and correct transcript of the record proceedings had in said court in said cause, which the said praecipe directed to be included therein, as the same appear of record and on file at my office and in my custody. And I further certify that I return to the United States Circuit Court of Appeals with the said transcript of record attached, the original citation in said cause.

And I further certify that the cost of the foregoing transcript is \$33.65, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Portland in said District this 22d day of August, 1922.

[Seal]

G. H. MARSH,  
Clerk. [122]

[Endorsed]: No 3923. United States Circuit Court of Appeals for the Ninth Circuit. Clem Rogers, Appellant, vs. Brix Bros. Logging Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed September 11, 1922.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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In the District Court of the United States for the  
District of Oregon.

IN EQUITY.

BRIX BROS. LOGGING COMPANY, a Corpora-  
tion,

Plaintiff,

vs.

CLEM ROGERS,

Defendant.

**Order Extending Time to and Including September  
20, 1922, to File Record and Docket Cause.**

Upon motion of Clem Rogers, the appellant herein, appearing by his attorneys, Wood, Montague & Matthiessen, and for good cause shown,—

IT IS HEREBY ORDERED that the time for filing the record and transcript on appeal herein and docketing the case with the clerk of the United

States Circuit Court of Appeals for the Ninth District be and the same hereby is enlarged and extended to and including the 20th day of September, 1922.

Dated this 24th day of July, 1922.

\*  
R. S. BEAN,  
District Judge.

O. K.—CAREY & KERR.

[Endorsed]: In the District Court of the United States for the District of Oregon in Equity. Brix Bros. Logging Company, a Corporation, Plaintiff, vs. Clem Rogers, Defendant. Order Enlarging Time to File Transcript on Appeal.

No. 3923. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including September 20, 1922, to File Record and Docket Cause. Filed Jul. 26, 1922. F. D. Monckton, Clerk. Refiled Sept. 11, 1922. F. D. Monckton, Clerk.